TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1916

No. [redacted] 159

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
PLAINTIFF IN ERROR,

vs.

A. C. OCHS, DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK AND TILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED MARCH 27, 1917.

(25,858)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1028.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

A. C. OCHS, DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK AND TILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 4, 1917.

1–3 STATE OF MINNESOTA,
County of Brown, ss:

In the Matter of the Complaint of A. C. OCHS, Doing Business under the Name of A. C. Ochs Brick & Tile Company, Complainant.

vs.

CHICAGO & NORTHWESTERN RAILWAY COMPANY, a Corporation and Common Carrier, Respondent.

Complaint.

The above named complainant makes the following complaint to the Honorable Railroad and Warehouse Commission of the State of Minnesota and alleges:

1. That the respondent is a corporation engaged in the business of owning and operating railroads in the state of Minnesota and elsewhere and has and maintains and operates a line of railroad extending through southern Minnesota from Winona to the South Dakota line and through the village of Springfield in said county and also other lines of railroad in said state and owns and operates an extensive railway system for the carrying of freight and passengers.

2. That the complainant is a resident of Springfield and owns and operates a brick and tile factory in the east portion of said village of Springfield and in the town of Burnstown adjoining the limits of said village and has owned and operated the same for about
4 twenty years and for the past several years has operated said brick and tile factory, during the spring, summer and fall at a capacity of about five carloads per day; that almost the entire output of said factory is shipped out over respondent's railroad and said respondent has for many years received and is now receiving a large amount of freight revenue from complainant's said business; that no other line of railroad is available for complainant for shipment of the product of said factory.

3. That in the fall of 1914 complainant began the work of erecting a new and modern brick and tile plant in connection with and adjacent to the plant which he has heretofore operated and has already constructed one permanent brick building 85x180 feet with an addition thereto 44x120 feet and two permanent kilns and a clay storage building 120x44 feet and is about to erect eight more kilns and install electrically driven machinery throughout, all operated from a central generating station; that the erection of said eight kilns will require about twenty carloads of firebrick which will have to be shipped in over respondent's road and unloaded at said new plant at a point where there is at present no side track; that a large amount of machinery will likewise be shipped in and unloaded for use in said new buildings, requiring the side track facilities herein prayed for, which shipments will arive in from thirty to sixty days' time. That

as soon as said new plant is completed, the complainant will start the manufacture of brick and tile therein and same will be burned in said ten new kilns which will be constructed at a point where there is no sidetrack facilities and that in order to load the same into railway cars economically and in a practical way it will be necessary to have a new sidetrack alongside of said new kilns, also for the unloading of coal to be burned therein.

4. That hereto attached and marked Exhibit A and made a part of this complaint is a plat showing the location of the old plant with reference to the main line of respondent's railroad and the present sidetracks which were heretofore constructed for the accommodation of the business at the old plant; also the location of the new plant, the buildings and kilns constructed and to be constructed and the proposed changes desired by complainant in the matter of sidetracks.

5. That the capacity of the new plant will be eight carloads per day and said new plant will be operated throughout the whole year; the old plant will continue to be operated as heretofore, during favorable weather, and the investment in the improvements now made and being made and in contemplation for the near future amounts to the sum of $125,000.00.

6. That complainant owns all the land upon which the proposed sidetracks are to be constructed.

7. That complainant needs at the present time and will in the near future have still greater need of a new sidetrack, as shown on Exhibit A, and marked thereon "Proposed track to new plant," approximately 350 yards in length, to be used in unloading the twenty carloads of firebrick to be used in constructing the remaining eight new kilns, also the machinery for the new plant and the coal to be used in the kilns when in operation and to load the products of said new plant into the railway cars.

8. That there is at present a sidetrack about 260 yards in length used mostly for unloading coal at the engine house, also a sidetrack about 200 yards in length leading to the old kilns (at the old plant), both of which are shown on Exhibit "A" and said latter track to the old kilns has a dangerous curve about where the kilns are located. That in the past four or five years the respondent has equipped most of its freight trains with large engines which are unable to traverse said sidetrack on account of said curve and complainant has to wait until a train with a smaller engine comes along to do the necessary switching, which often shows up unexpectedly when complainant has some partly loaded cars on track and the contents of these partly loaded cars are often damaged thereby; that complainant often is compelled to suffer unreasonable delays in having switching done and frequently respondent has switch engines from Sleepy Eye and Sanborn come to complainant's yards to do switching.

9. That this dangerous curve can be eliminated by connecting the sidetrack to the old plant with the proposed sidetrack to the new plant, thus placing both on the same switch from the main line and thereby facilitating switching operations and thereby removing the

old sidetrack from in front of the house (wherein complainant's office is located) and making the yards more accessible and safe for vehicles and pedestrians. By so doing, the sidetrack to the engine house can be shortened, as shown on Exhibit "A."

10. Complainant expects and intends to have said new plant in operation and to turn out eight carloads of product per day some time this fall and needs the new sidetrack at once for the unloading of firebrick and machinery as hereinbefore stated.

11. That complainant and respondent have heretofore negotiated for the building of said sidetrack to the new plant and respondent has had its engineer on the premises and staked out a feasible route for said track, which is shown on Exhibit "A" and complainant has purchased such part of the land over which said proposed sidetrack will be located as he did not previously own in order that said sidetrack may be so constructed. That complainant has requested respondent to construct said sidetracks as are herein prayed for
7 but respondent has refused to do so and still refuses to do so except on condition that complainant pay the cost thereof. That complainant believes that it is unjust for respondent to ask him to pay said cost because of the volume of business which will accrue to respondent from said new plant, the permanency thereof and the fact that the said new plant is located so near to respondent's main line of road and he has already gone to the expense of purchasing land for same and by making the changes herein prayed for respondent can utilize much of the materials in the old sidetracks which can be taken up, and that this commission will be justified in requiring respondent to construct the sidetracks herein prayed for at its own expense.

Wherefore, Complainant prays that your honorable commission make its order requiring respondent to construct and maintain a new sidetrack extending from its main track to the south side of the new kilns of complainant's new plant, as indicated on Exhibit "A" and to construct and maintain a new sidetrack from the said proposed sidetrack to the old kilns, as indicated on Exhibit "A" and to remove the present sidetrack or so much thereof as may be unnecessary after the new track shall have been constructed and to fix the terms upon which same shall be done, and for such other and further relief as the commission may deem just in the premises and as complainant may show himself entitled to.

Dated at Springfield, Minnesota, June 28, 1915.

AUG. G. ERICKSON,
Attorney for Complainant,
Springfield, Minnesota.

(Verified.)

Plat "Exhibit A" filed with return.

8 *Answer.*

(Title.)

The respondent for its amended answer to the complaint herein:

1. Admits and avers that it is a railway corporation, owning and operating lines of railway in Minnesota as alleged, and in other states, and that it is a common carrier by railroad engaged in interstate commerce and in all respects as such subject to the acts of Congress.

2. Admits that complainant owns and has long owned and operated the brick and tile factory described in the complaint situated near respondent's station of Springfield, Minnesota. That a large part of the output of said factory is and long has been shipped over respondent's lines of road to points within and without the state of Minnesota. That said Springfield is located on no other line of road than that of respondent.

3. Admits that the allegations of paragraph 3 of the complaint are substantially true in so far as respondent is informed.

4. Admits that the plat referred to in paragraph 4 of the complaint, to which it is attached as Exhibit A, substantially represents complainant's plant and adjacent premises, as alleged.

5. That as to the allegations of paragraphs 5 and 6 respondent, upon its information, believes and admits them to be substantially true, except that parts of the proposed track would necessarily be located upon respondent's right of way.

6. Admits and avers that complainant's old plant, so-called, as shown on said Exhibit A, is provided with sidetracks connecting it with respondent's road.

7. That the construction and re-arrangement of said track, as proposed and demanded by complainant, at his plant would necessitate two switch connections with the main line of the road thereat,
9 the maintenance and operation of which would not be practicable and would involve undue and extraordinary hazard to the property and road of the respondent.

8. Admits that complainant and respondent have heretofore had some informal negotiations about the construction and maintenance of said sidetracks, and that respondent has refused to construct and maintain the same at its own expense and without compensation, but alleges that it is, as complainant is informed and regardless of objection thereto, willing to furnish the complainant with suitable and adequate track facilities connecting his said plant with its road upon the same basis that it furnishes track facilities to other persons similarly situated along its line of road in the state of Minnesota; that is to say, it is willing to construct suitable and adequate track facilities substantially as asked for by the complainant herein, or as shall be directed by this Commission, provided the complainant upon his part will assume and agree to pay, or otherwise indemnify respondent against, the net cash expenditures required in the construction of said track and connecting the same with respondent's road.

9. Further answering, respondent respectfully represents and avers:

a. That it is under no legal duty or obligation to complainant to construct and maintain said tracks at its own expense, or without due compensation first being made, or duly secured to it.

b. That the granting of the prayer of the complaint by order of the commission, or otherwise, requiring the construction and maintenance of said track at respondent's own expense, or otherwise, would be contrary to and violative of the laws of Congress which govern and regulate the conduct and instrumentalities of respondent in the premises as an interstate carrier by railroad.

c. That the requirement of construction and maintenance
10 of said track by order of this commission at the expense of the respondent, without due compensation being first made or secured to it, would be violative of the constitution of the state of Minnesota in that it would deprive the respondent of its property without due process of law and deny to it the equal protection of the law.

d. That such requirement of the construction and maintenance of said track at the expense of respondent, without due compensation being first made or secured to it therefor, would be violative of the constitution of the United States, and particularly the Fourteenth Amendment thereof, in that it would deprive the respondent of its property without due process of law and deny to it the equal protection of the law.

Wherefore, Respondent prays that in case it is ordered to install said track asked for, the complainant may by order of the Commission be required to assume and agree to pay the net cash expenditures required for such construction or to duly indemnify respondent against such expenditures, or otherwise that complainant's petition be dismissed.

Dated September 11, 1915.

BROWN, ABBOTT & SOMSEN.
Attorneys for Respondent, Winona, Minnesota.

Order of Commission.

(Title.)

This matter came on for hearing before Commissioner Ira B. Mills at Springfield on the 18th day of August, 1915, and again before the same Commissioner at St. Paul on October 20th, 1915. The complainant appeared at both hearings by A. E. Erickson, its Attorney, and A. C. Ochs, and the Respondent by L. L. Brown, its At-
11 torney, H. J. Wagen, its General Agent, and M. J. Boyle, Superintendent.

The evidence was taken on the premises and a personal examination of the plant, railroad trackage and clay beds were made by the Commissioner and after hearing all the evidence he makes the following findings and report:

"The Respondent is a corporation organized and incorporated under the laws of the States of Illinois and Wisconsin, is a common carrier and operates a line of railroad extending through southern Minnesota from Winona to the South Dakota line, passing through Springfield, an incorporated village of over 1,500 inhabitants, in Brown County.

About twenty-six years ago the Complainant established a brick kiln near Springfield and since that time has been furnished with trackage by respondent's road for the purpose of shipping in its supplies and shipping out its product. The plant was small at first, only shipping 25 or 30 cars a year, but it has continually grown and has been shipping from 200 to 350 cars per year and at present its capacity is from 43,000 to 45,000 brick per day. During the year 1914 its shipments were 245 cars of its product "out," and three cars of lumber and 50 cars of coal "in," on which the freight charges were $10,116.83. Complainant's business is growing and it has been found necessary to increase the size of the plant by building a number of new kilns and providing storage for clay and other materials used in the manufacture of brick, tile and its other products. The improvement to the plant will cost complainant $150,000.00 and greatly increase the output. When completed it will have nine new kilns and will be as perfect a plant for the business in which it is engaged as there is in the United States. For some time past in addition to brick Complainant has manufactured drain tile and material for silos, for all of which it has an extensive patronage
12 upon Respondent's line of road and its connections in Minnesota, North and South Dakota, Iowa and Illinois.

The new plant will have a capacity of from 150 to 200 tons of clay per day, making from 75 to 80 carloads of manufactured material for shipment, and will be able to run all the year around. Besides the product "out" there will be shipments of coal and lumber "in" and from 30 to 40 cars of fire brick to be used to complete the plant. Practically all of the product of said plant is shipped over Respondent's line, there being no other railroad reaching Springfield. In order for Complainant to do business in its new plant it will be necessary to reconstruct and re-arrange the trackage to the plant, requiring the building of some entire new trackage. The trackage as shown upon Exhibit "A," hereto attached and made a part of these findings, is found to be necessary and proper for the service of Complainant's industry. The distance is 1920 feet from the head block of the proposed trackage to the head block of the last switch in the east end of Respondent's yards at Springfield. The survey for the same was made by the Commission's Engineer, together with the Engineers of Respondent and Complainant, and the location agreed upon.

There was no dispute that this trackage was necessary for the proper operation of Complainant's plant, the only question presented being upon what terms it should be constructed. An estimate of the cost of construction has been made by the Commission's Engineer and such estimate is hereto annexed approved by the Commission, marked Exhibit "B" and made a part of these findings. The esti-

mate of material in Exhibit "B" is somewhat lower than the estimate furnished by Respondent. The Commission's Engineer made his estimate upon the report to the Commission of Respondent of the cost of such material on the division where this industry is
13 located for the year 1914.

The Respondent is willing to build the track if the Complainant will pay for it. The Complainant is willing to pay for the grading and claims that it should be Respondent's duty to bear the other expense. Respondent contends that it can not be compelled to build any part of a track to an industry off its right of way. The Supreme Court of this State has settled the law on this question adversely to Respondent's contention (State vs. St. Paul Road, 115 Minn. 51).

Respondent has been serving this industry with trackage for over 20 years and it has proven to be a profitable investment—grown to that extent that Complainant is putting in $150,000.00 to enlarge it and double its production and double the revenue it will furnish to this railroad. It has been the custom of this and other railroads in this State to grant sidetrack privileges to industries like this and others and bear a part of the expense.

The clay for manufacturing the brick is located adjacent to this plant; it cannot be moved to the Respondent's line at its sidetracks in the village and manufactured at a profit, and Complainant's industry and capital are furnishing revenue for Respondent's road.

Under the facts presented here the Commission under its general power would have the right to require Respondent upon reasonable terms to furnish sufficient trackage for this new plant, the same as if it was located on its industrial tracks at Springfield or some other station. Terms found to be reasonable are as follows:

Complainant to furnish the right of way and give Respondent a deed or agreement conveying to Respondent the right to the perpetual use of said right of way for railroad use; Complainant either do the grading required for the putting in of the new track or pay
14 Respondent for the same; also that Complainant pay for the readjustment, raising or resetting of telephone poles, if necessary, and dismantling or removing any buildings that is necessary in the construction of this track and all grubbing that is necessary, and that all the other expense for materials required or work or labor done in the construction of said track shall be paid for by Respondent."

The report of Commissioner Mills is hereby approved and adopted by the Commission.

It is therefore ordered that within thirty (30) days after Complainant shall perform the conditions that it is hereby required to perform or agree to pay Respondent upon completion of the track the amount of the Engineer's estimate for the same as shown in Exhibit "B," Respondent construct the track to Complainant's industry as the same is laid out and shown on Exhibit "A."

By the Commission:

O. C. CLAUSEN,
Secretary.

Dated at St. Paul, Minn., Nov. 13, 1915.

Estimated Cost of Proposed Rearrangement of Tracks at Brick Yard of A. C. Ochs, Springfield, Minnesota, on the C. & N. W. Ry.

Grading:	
2146 c. y. grading @ 25c	$536.50
415 c. y. grading @ 40c	166.00
Track:	
116'-72 lb. S. H. Rail 2,784 lbs.	
1456'-60 lb. S. H. Rail 29,120 lbs.	
14.24 G. T. @ $23.00	325.52
655 untreated tamarack ties @ 33c	216.15
Note: (30% of old ties to be used)	
2500 F. B. M. switch ties @ $26.00 per M	65.00
8 pr. 72 lb. S. H. angle bars 40 lb. per pr. 320 lbs.)	
50 pr. 60 lb. S. H. angle bars 33 lb. per pr. 1650 lbs.)	
1970 lbs. @ $1.50 per C	29.55
15	
2½ kegs bolts @ $3.20	8.00
11½ kegs spikes @ $3.00	34.50
1564 tie plates (all ties plated) 2¾ lbs. each 4301 lbs. @ $1.50 per C	64.52
550 rail braces @ 10c	55.00
1 No. 10 72 lb. spring rail frog turnout complete	95.00
Laying 1 switch	25.00
Moving 2 switches @ $40.00	80.00
Laying and surfacing 1563' of track @ 15c	234.45
Moving 1065' of track @ 7c	74.55
Shifting 475' of track	20.00
Miscellaneous:	
Two 16' crossings in place @ $7.50	15.00
Raising two single telephone leads and shifting one pole	10.00
Dismantling wing of barn	10.00
Grubbing—12 sq. rods, approximately	25.00
	$2,089.74
10% on above for Engineering and Superintending	208.97
Total	$2,298.71

MINNESOTA RAILROAD & W. H. COMMISSION, ENGINEER'S OFFICE.
F. F. P.

St. Paul, Minnesota, November-1915.

Exhibit "A" is a plat of the trackage in question attached to the order and filed with return.

Exhibit "B."

Notice of Appeal.

(Title.)

To Railroad & Warehouse Commission and A. C. Clausen, Its Secretary, State Capitol Building, St. Paul, Minn., and A. G. Erickson, Attorney for Complainant, Springfield, Minn.:

Gentlemen: You Will Please Take Notice That the re-
16 spondent above named, Chicago & North-Western Railway Company, appeals to the District Court of the Ninth Judicial District in this state, in and for the county of Brown, in which county complainant resides and respondent has a station, office and agent, from the decision and order of the Railroad & Warehouse Commission, made and entered in the above entitled proceeding at St. Paul, Minnesota, on November 13, 1915, wherein and whereby the commission granted complainant's petition for an order requiring respondent to, at its own cost and expense (except cost of right of way and preparing same for track by grading, etc.) re-arrange and construct the sidetrackage, connecting, by switches, with its main line of railway and running to the brick and tile plant of complainant near Springfield, Brown County, Minnesota, as such trackage is laid out and shown upon the plat, Exhibit A, attached to and made a part of said order.

This appeal is from the whole and every part of said order and for the purpose of having it vacated and set aside because unlawful and unreasonable.

Dated December 2nd, 1915.

CHICAGO & NORTH WESTERN RAILWAY COMPANY,
By BROWN, ABBOTT & SOMSEN,
Its Attorneys.

Due service of the foregoing notice of appeal upon the Railroad & Warehouse Commission and its secretary is hereby admitted on this 8th day of December, 1915.

[SEAL.]

A. C. CLAUSEN,
Secretary of Railroad & Warehouse Commission, St. Paul, Minnesota.

Due service of the foregoing notice of appeal upon the com-
17 plainant above named is hereby admitted on this 3rd day of December, 1915.

AUG. G. ERICKSON,
Attorney for Complainant, Springfield, Minnesota.

The above entitled matter came duly on for hearing and determination before the Hon. I. M. Olsen, Judge, without a jury, at his Chambers in the Courthouse in the city of New Ulm, in said county and state on Saturday, January 29, 1916, at 9:40 A. M.

A. G. Erickson, Esq., appeared as attorney for the applicant.
Mr. Flannery, Esq., of the Attorney General's office, appeared as attorney for the Intervener.
Brown, Abbott & Somsen, Esqs., appeared as attorneys for the defendant.

Mr. Flannery: I want to offer my notice of motion and affidavit and also the transcript of the testimony, a certified copy of the transcript of the evidence which was taken before the Railroad & Warehouse Commission. I think it should be filed, and then by stipulation it would not have to be duplicated.

By the Court: Yes, I suppose so.

Mr. Flannery: I suppose it is all right to have them stamped or marked filed after this hearing.

By the Court: Yes, I suppose so.

Mr. Flannery: For the purpose of making a record, I offer this transcript of testimony in evidence.

Mr. Brown: Objected to as incompetent, immaterial and hearsay and on all the grounds specified in paragraph 9 of the answer to the amended complaint—amended answer of the defendant.

18 The grounds specified are constitutional grounds, your Honor.

Mr. Flannery: You do not object to it on the ground, however, that it is not a proper transcript?

Mr. Brown: No, no. I object to it on the ground that the Court must take its own testimony here; not some other body's.

Objection sustained.

Mr. Flannery: Note an exception by the Intervener.

Mr. Flannery: This is a transcript of the evidence with the certificate of the clerk of the commission, but I understand there is no objection to the relevancy of this being the transcript—this transcript being filed in this particular form?

Mr. Brown: I do not object to the form of the testimony; I object to its materiality and competency and object to it on the ground it is hearsay.

Mr. Erickson: I suppose this offer of the transcript should include the exhibits.

Mr. Flannery: I make a separate offer of them.

By the Court: Well, I suppose the burden of proof is on the other party here. I don't know that you have anything to do.

Mr. Flannery: We offer in evidence, if the Court please, the findings of fact and the order of the Commission.

Mr. Brown: Same objection.

Mr. Erickson: That, I presume, would be all that we have to do at the start.

By the Court: Yes; I don't think you have to do anything; I think the burden of proof is on the other side from the start.

Mr. Brown: Then we submit it without any testimony; is that your plan? I am not going to offer any testimony.

Mr. Flannery: No.

19 Mr. Brown: No; except this transcript in the way we stipulated; otherwise not.

Mr. Erickson: We may have some little testimony: I don't think very much.

Mr. Brown: Then I will read this evidence.

By the Court: That is testimony now for the appellant?

Mr. Brown: Well, it could be called appellant. The facts are not going to be disputed, Your Honor.

Mr. Erickson: This is the testimony that we offered, that you read now?

Mr. Brown: Yes; yes.

Mr. Brown reading—

Mr. A. C. Ochs being sworn, testified as follows:

Mr. Erickson:

Q. Your name is A. C. Ochs?

A. Yes.

Q. You reside at Springfield?

A. Yes.

Q. Are you the owner of the brick and tile plant known as the A. C. Ochs Brick & Tile Company?

A. Yes.

Q. What is the general nature of the business of that company?

A. We manufacture clay products.

Q. Brick and tile?

A. Yes.

Q. Any silo bricks?

A. Yes, that would be in brick originally. Also face brick and fire proofing.

Q. And where is your plant located?

A. At Springfield.

Q. About how far east of the local railway yard of the C. & N. W. at Springfield?

A. I walk to the post office in ten minutes.

Q. I suppose that is less than a mile?

A. Yes, it is not half a mile, I do not think.

Mr. Mills: Half a mile from where?

A. From the depot.

Q. It is not half a mile from the local yards of the C. & N.

20 W. and that is the only railway passing thru Springfield?

A. Yes.

Q. And the land on which the brick yard is located, is that owned by you?

A. Yes.

Q. And how far is this land and the brick yard located from the main line of the C. & N. W.?

A. It is adjoining the main line.

Q. How long have you owned this plant?

A. I started about 26 years ago with a partner and we were together about half a year. It would be 24 or 25 years.

Q. Have you operated this plant all the time since then?

A. Every day it was possible on account of weather.

Q. Have additions been made to the equipment of the yards from time to time during the past 24 years?

A. Yes; we first moulded by hand, then by horse power and then by a little engine that we bought from a farmer, and afterwards we put in this equipment that we have now. Then *he* built down draft kilns.

Q. Then the plant as it stands today was built by yourself?

A. Yes.

Q. Can you give any idea of the extent of the business of the brick yard in the past, about the number of cars of brick that have been shipped out of here?

A. The first year we shipped about twenty-five or thirty and then we ran up to three hundred or three hundred and fifty.

Mr. Brown: What does that mean?

Mr. Ochs: Cars.

A. Something like that. I believe we got a capacity of three to four thousand brick when we are running full time.

Mr. Erickson: That we have corrected at the second hearing.

Mr. Brown: Will we read that correction right in here?

Mr. Erickson: Yes, I guess we better.

21 Mr. Ochs: It is thirty-three to forty-five thousand.

A. There is coal shipped in here, too.

Q. About how much coal has your plant been using per year? Say, in recent years?

A. William Ochs can tell you better than I about that. We ship a lot of hollow brick and well tile.

Q. Things that go with the brick business you handle them as a jobber and sell on contract?

A. Yes.

Q. Most of the product is shipped out?

A. Yes.

Q. About what proportion is used in town or by farmers around Springfield, roughly speaking?

A. One thousandths part.

Q. You have started to construct a new plant, have you?

A. Yes.

Q. Where is that new plant located with reference to the old one?

A. It adjoins the old; it is connected with the old plant on the south.

Q. The machinery of the old plant, the generating machinery will remain in the present location, will it?

A. No, we will have to buy generating machinery; it will be located in the old plant.

Q. The present boiler and engines, together with what additions are added, will be located where they are now?

A. Yes.

Q. Will this new plant be operated all the year round, winter and summer?

A. That is our intention.

Q. The old plant has been operated only while the weather permits?

A. Yes.

Q. And the clay from the pit, how will that be handled in the winter time for the new plant?

A. In a storage house that we will build.

Q. The clay will be stored there in the winter time and the supply taken from there to the new plant?

A. Yes, we will fill up the storage house but will continue to use the clay right out of the pit. We will use the storage house
22 clay during severe weather only. We will run out and in all the time, as long as it does not freeze too hard. So if it should freeze up we have a supply for three months' storage clay on hand.

Mr. Erickson: There is a plat here and that may be marked Exhibit "A." And so far as the explaining is concerned, we can use Mr. Brown's plat.

Mr. Brown: And was that done? I didn't have any plat, did I? I had a copy.

Mr. Mills: Plat attached to complaint is offered in evidence.

Mr. Brown: No objection.

Mr. Brown: Now, where is the plat? Plat marked Exhibit "A" goes in without any objection.

Mr. Erickson: Mr. Ochs, referring to this plat, here are nine or ten circles shown here in what is marked 'new plant.' What do these represent?

A. They represent the kilns for burning clay.

Q. How many of these are at the present time in process of construction; actually in process of construction?

A. Four; we have two practically finished and two of them half finished.

Q. How deep in the ground do they go?

A. There are some places where they go deeper than others; they are from five to six feet.

Q. How are they with regard to being modern and up-to-date; are they the latest type?

A. I do not think there are any more modern in the United States, because it is the last word in the clay business.

Q. And these kilns would be used to burn the products of the new plant?

A. Yes.

Q. And you will have mechanical facilities for loading the products into these kilns, will you?

A. Yes; we will have gravity carriers to handle them into the cars.

Q. Referring to the demand for your product; have you
23 always had sufficient demand for the product?

A. I could get you our order book and show you how many orders we cancelled because we could not ship the last few years.

Q. You are satisfied, are you, from a standpoint of business, that the market for your product will be sufficient to warrant the building of this plant?

A. Yes.

Q. You make that statement from your experience of the past twenty years, or more?

A. Yes.

Q. The remaining of these kilns which are not yet begun, have you let the contract for those, or not?

A. Yes.

Q. And are they going to be built?

A. They are at it now.

Q. This large building that you see on the plat, that is constructed now, is it?

A. Yes.

Q. Under roof?

A. Yes.

Q. And considerable of the inside walls and flooring and such things are put in?

A. Yes.

Q. That building will be used for what?

A. That will be used for manufacturing clay products and drying.

Q. The manufacturing, that is the shaping of the product and drying process will take place in that building?

A. Yes.

Q. You will get the clay from the outside, possibly from the storage plant, through the tunnel into that building where the machinery that shapes the clay product is located and the drying part?

A. Yes.

Q. And from there it will be transferred into the kilns for burning?

A. Yes.

Q. And from there it is ready to be loaded into cars?

A. It will be transferred on to about four hundred small drying cars and they will pass through the dryer and when they get to the kilns we shove cars and all right in and unload them in there.

24 Q. From the kilns the product is loaded into railroad cars?

A. Yes.

Q. And for these nine or ten new kilns you want a spur track?

A. Yes.

Q. The present sidetrack facilities could not possibly handle them, could they?

A. We could not handle it unless we loaded them on wagons and hauled it over.

Q. It is necessary to have this track as is outlined on Exhibit "A"?
A. Yes.
Q. Or substantially so?
A. Yes.
Q. This Exhibit "A," who prepared that?
A. The Northwestern Railway had a surveyor here and he staked the proposed track out first, and we followed that as nearly as we could. We have stakes in there but we did not have an instrument to follow it out, and had no regular facilities for following the curve. I think it was a twenty degree curve; it will be as the railroad company stakes it out.

Mr. Flannery: I notice this is marked "twenty per cent"; I suppose that is a mistake.
Mr. Brown: It should be the degree.
Mr. Erickson: That is all corrected after a while.
Mr. Brown: The plats cover the whole thing anyway.

Q. That is where the new proposed sidetrack branches west?
A. Yes.
Q. You are an old contractor and a sort of a architect yourself?
A. I have my papers on that.
Q. In fact, you are the architect of the new plant, are you not?
A. I am. I have a certificate from the Correspondence School of Architecture.
Q. And the location of these houses and buildings and kilns, etc., on this plat, Exhibit "A," are correct, are they, or substantially so?
A. They are as nearly as we could get it.
25 Q. Would you call it approximately correct?
A. Yes.
Q. The distance of this proposed new track, as given on this plat, is 350 yards; that is approximately correct, is it?
A. As far as that is concerned the track may have to be a hundred feet or so longer; I do not know how they will get the curve in.
Q. When the railroad engineer and surveyor were here and staked out the sidetrack you wrote in and got them out here, did you not?
A. Yes.
Q. And then you purchased additional ground for the sidetrack?
A. Yes.
Mr. Mills: Have you a complete right of way for it?
A. Yes.
Mr. Erickson: You own all the land upon which the sidetrack has to go, except the part of it which is railroad ground?
A. Yes.
Q. And you have a warranty deed to it?
A. Yes.
Q. In your opinion, at the time of building this new sidetrack to your new plant is the proposed spur, or I presume you would call it a spur, branching off from this proposed sidetrack from your old plant, would that serve the old building better than the present sidetrack to the old one?
A. Yes.

Q. The present sidetrack to the old plant, have you had trouble with cars being derailed on that track?

A. Yes.

Q. Then if this new spur, which we have been talking about were constructed, the present sidetrack to the old plant could be taken up, could it?

A. Yes.

Q. And the present sidetrack goes right in front of your office here, and the residence of your son, as shown on the plat?

A. Yes, that could be taken up, according to my idea.

Q. And with that taken up the sidetrack which supplies your engine room or boiler room or coal bins, that can be extended
26 farther east, can it not? The switch can be moved farther east?

A. Yes, part of the old track that supplies the power house can be shortened, as shown on the plat.

Q. The power for driving the machinery in this new plant is going to be what?

A. We are going to generate our own electricity and it will be motor driven.

Q. And your generating plant will be located in the old building in the power house?

A. Yes.

Q. The old plant will be continued in operation just as at present?

A. Yes.

Q. And the new plant will be operated by this also?

A. Yes; the old plant will run only during the summer time but in the winter time we will have more drying room as we can use one floor for drying of our output from the old plant; so it will increase the capacity of the old plant as well as the new.

Q. What do you figure the daily capacity of your new plant of common brick?

A. We have our machinery so we can manufacture 150 tons to 200 tons of clay.

Mr. Mills: In what time?

A. Ten hours.

Mr. Erickson: About how much output would that be of the finished product?

A. That is the weight of the clay; that would probably make 75 to 80 thousand brick.

Mr. Mills: How many carloads?

A. About 8.

Mr. Erickson: And the capacity or the old plant is about how many?

A. When the weather permits we can make 43,000 to 45,000.

Q. Give us an estimate of the number of cars that are being turned out of the old plant?

A. If we make brick it will be about 4½ cars; if we make tile it will be a little more, because the tile minimum is less in this state.

Q. You will also require considerable fire brick for these new kilns?

A. Yes.

27 Q. Have they been shipped in here? They came from the outside?

A. Yes.

Q. About how many carloads do you anticipate will have to be shipped in before they are completed?

A. Between thirty and forty carloads.

Q. I notice in the complaint in this case we have estimated it at twenty?

A. Yes, but we will use more now.

Q. They will have to be shipped in over this railroad and unloaded off the sidetrack here?

A. Yes.

Q. At the present time, without any sidetrack facilities *we* have to unload them from the old sidetrack?

A. Yes, but I think we will have another sidetrack before we can get the kilns all completed.

Q. In the kilns you will burn coal, will you not?

A. Yes.

Q. Can you give an estimate of the cost of your entire plant complete?

A. About $150,000.

Q. About how soon do you expect to commence to turn out product; how soon do you expect to have it in operation?

A. We expect to begin operating the new plant, it will be about two weeks after we shut down the old one, because there is a lot of machinery will not be put in until the spur line is built.

Q. It will be this winter?

A. About the latter part of October.

Q. Can you tell how much you paid for the right of way for this little corner that you bought for the purpose of putting the track in?

A. It was figured at one thousand dollars per acre.

Q. It was a little over one-fifth of an acre?

A. Yes.

Q. It cost you about $210?

A. Yes.

Q. This little corner was necessary in order to get the curve in?

A. Yes.

Mr. Brown: The company never has agreed to put this

28 track in as you have it arranged on Exhibit "A"?

A. No.

Mr. Brown: And the purchase of this right of way that you paid $210 for, that was on your own motion?

A. Yes.

Mr. Brown: That must be cross examination; yes, that is cross examination.

Cross-examination.

By Mr. Brown:

Q. You had no assurance a track would be put in for you by the company?

A. No.

Q. This Exhibit "A" is an approximate map of the present side track and the proposed sidetrack?

A. Yes.

Q. Not drawn to a scale?

A. Only approximately to a scale; I got it as near as I could.

Q. It shows approximately the length of the present sidetrack a- you outline there?

A. Yes.

Q. And the same condition as to the proposed track?

A. Yes.

Q. The map also shows by a marking; the old track indicated by one mark, does it?

A. Yes.

Q. And also the new track is indicated by another style of marking?

A. Yes.

Q. And also the old track which may be later moved, indicated by another style of mark?

A. Yes.

Q. And is placed upon Exhibit "A" by a little key, as indicated?

A. Yes.

Q. The proposed sidetrack joins the main track, you say, half a mile east of the depot?

A. It is not that much.

Q. How far is it?

A. We can measure it; it is not a quarter of a mile.

Q. It is outside of the station switches?

A. Yes.

Q. The old track switch is still east of that, is it not?

A. Yes.

29 Q. As indicated on Exhibit "A"?

A. Yes.

Q. And the tracks as you propose on Exhibit "A" would involve two switches on the main track?

A. Yes.

Q. One down here near the building marked 'clay storage'?

A. Yes.

Q. And the other up to the west as shown on the plat?

A. Yes.

Q. You have never made an estimate or had an engineer make an estimate of the cost of the arrangement of these tracks, as you have suggested?

A. No.

Mr. Brown: And I will say that the Company has not done so.

Do you have in your mind the figures of what the expense of that arrangement would be?

A. No, but still I told one of the gentlemen that I would take the contract for three or four thousand dollars.

Q. Would you do that without figuring?

A. Yes.

Q. Now, when do you expect to have the new plant running capacity?

A. About the latter part of October.

Q. All the kilns completed?

A. Yes, I think they will be.

Q. Have you on your books for a reasonable period the amount of the output for that time, say, for two years back?

A. We have a lot of orders that we had to countermand; people were not going to order unless they can get it when they want it.

Q. When you say that you will have your plant running capacity in October, does that mean you will supply all the demand that is made on you?

A. Yes; not in the winter time, but in the spring.

Q. That will be by both plants, the new and the old—how many cars per day of ten hours, about?

A. Twelve or fifteen cars.

Q. How many of these would be shipped away from Springfield?

A. Nine hundred and ninety-nine out of every thousand; only a small part of the product will be used in Springfield.

Q. You ship out of the state?

A. Yes.

Q. And your coal comes out of the state?

A. Yes.

Q. Where does it come from?

A. We use Youghiogheney; it comes from the east.

Q. What was the investment when you started in the plant, roughly speaking?

A. About sixty thousand or seventy thousand dollars.

Q. And your new plant is hundred and fifty thousand dollars?

A. Yes.

Q. This money being invested in this plant was made out of the plant, was it?

A. We intend to make it.

Q. Your market lies all over the Northwest?

A. Yes.

Mr. Brown: I wish to make the following note at this time: That this testimony was taken after an examination of the plant and premises by the Commission and parties, and before there has been any estimate of the cost made of the proposed improvement by either party, and after seeing the plant it is considered by the railway company that it may desire to amend its answer to the effect that it raises the issue of the practicability or feasibility of the proposed new track, particularly, among other things, on account of

the expense that may prove to be necessary, after such has been estimated. I want to reserve that point.

Mr. Brown: This track is not a part of the switching yards of the company and will not be, of course, for general use?

A. We have shipped in stuff here and farmers unloaded it and we have shipped in piles that we do not have anything to do with.

Mr. Erickson: That should be "tiles."

Mr. Brown: "Tiles."

31 Q. But as a general proposition, Mr. Ochs, this track is an exclusive track for your plant; it serves your plant exclusively?

A. We have to sign a contract every time that the track belongs to the railway company; I believe they can use it for any purpose the same as I can.

Q. What I want to say is, so far as you know this track will be used exclusively to serve your plant?

A. I do not care whether you use it, or not; I want this track for my purposes.

Q. That is all you want it for?

A. Yes.

Q. Now, there is no other industry proposed to go on this track?

A. Not that I know of.

Q. You own the land upon which the track runs except the right of way of the railway company?

A. Yes.

Q. And you have no idea of having any other industry constructed on this track on the south of the track?

A. No.

Q. You know of no other industry or factory to be located on this track?

A. They have been boring for clay, Mason City people, and a Mr. Roach was here from some place, I don't know where, but there are none at the present time.

Q. And the fact is, as far as you know now, as you understand it, that this is an exclusive track for A. C. Ochs & Company?

A. Yes.

Q. To be used by that company alone?

A. I do not understand that.

Q. What do you understand is to be the use of this track aside from your company?

A. I am asking that track; if the railroad company finds another purpose for it it will be all right, too.

Q. But you do not have any other idea in mind?

A. No.

Q. The company, as far as you know, has switching yards at the city here, house tracks, passing tracks, industry tracks for the use of the public?

A. Yes.

32 Q. The plant is the child of your own efforts?

A. Yes.

Q. You worked it up?
A. Yes.
Q. I think you have given an estimate of the expense or stated you had not made any estimate of the expense of this track?
A. That is right.
Q. You sell your product f. o. b. Springfield, do you not?
A. No, mostly f. o. b. destination.
Q. You figure it delivered?
A. Yes.
Q. But the freight, of course, is added to your price?
A. Yes.
Q. Would it be possible or practicable to operate this new plant without the track?
A. It would not be profitable.
Q. You designed the new plant and started to build and have gone so far without any assurance of a track?
A. Yes. I was assured I would get a track if I paid for it.
Q. And that you object to?
A. Yes.
Q. Object to paying any part of it?
A. I did not say that.
Q. You do expect to assume a part of the expense?
A. Yes.

Mr. Brown: That was corrected, I think, afterwards.

Q. You insist that the company shall put the track in for the use of your plant at whatever expense is necessary to them?
A. Yes.
Q. The old track that is in operation now is served by a track; it has been there for many years?
A. Yes; 24 years.
Q. And there is no complaint about that track, is there, so far as serving the plant is concerned?
A. We do have a little trouble about cars coming off the track.
Q. That was the railway company's trouble, it did not trouble you?
A. A good many times we could not get any switching done; it was impossible for a big engine to get down there.
33 Q. There has not been any trouble lately?
A. No.
Q. The track has not been moved since?
A. No.
Q. Your customers are largely contractors, are they not?
A. No.
Q. What line of customers are they?
A. Mostly buyers are lumber people; we sell to lumber people.
Q. Line yard men?
A. Yes; of course, there are some contractors but that is only a small part of our regular business; it goes to the line yards mostly.

Mr. Mills: Where is your principal market?

A. At the present time, west.

Mr. Brown: What state?

A. We have worked up a trade with our silos in Iowa, North Dakota, Illinois and South Dakota.

Q. Biggest part of your product is shipped out of Minnesota, is it not?

A. I should say about half.

Q. All your incoming freight is shipped from out of the state—coal?

A. Yes; fire brick, water color; everything.

Mr. Erickson: Mr. Brown, that is redirect examination.

Redirect examination.

By Mr. Erickson:

Q. You say that your coal is shipped from out of the state; does it come from Superior or the Duluth docks?

A. Superior.

Q. Does some come from Duluth?

(By William Ochs:)

A. We have changed companies sometimes and got it from Itasca, Wisconsin.

Mr. Erickson: Silo blocks; you people build your own silos, do you not?

A. Yes.

Q. You have crews that go out and put them up?

A. Yes.

Q. All your silo material is consigned to yourselves at the various points, or do you consign it to the farmer?

34

A. To the farmer.

Q. That is, you ship f. o. b. destination?

A. Yes.

Q. There is a lot of stuff shipped out of here in connection with your silo business and the crews that go out to put them up, it creates a lot of business?

A. Yes, we have worked up a big business.

Q. The silo business is your coming business?

A. Yes.

Q. And you have a silo designed which you think is as good as any on the market?

A. We think it is the best.

Mr. Mills: Do you ship the entire material that goes into the silo from here?

A. Except the lumber and sand and cement; we do not ship that from here but we ship all the blocks, reinforcement, fastenings, and everything that goes into the silo.

Mr. Ochs: Lime.

A. Except lime and sand and cement; we do not ship that from here but we ship all the blocks, reinforcements, fastenings and everything that goes into the silo.

Witness excused.

Mr. WILLIAM OCHS, being sworn, testified as follows:

Examination by Mr. Erickson:

Q. You are the son of A. C. Ochs, the complainant?
A. Yes.
Q. You are actually engaged with the office work of the company?
A. Yes.
Q. You are the general manager?
A. Yes.
Q. Can you give us an estimate of the amount of freight which has been paid on the product of the plant and on the material that has been shipped in during the last year?
A. I could give you but very little because some of this material was shipped f. o. b. destination; some f. o. b. here, etc. We do not trouble to keep track of all that. I have looked over our books and have taken the year 1912. We are making more per day now than we did then. The reason I have taken 1912 is because the books since then have not been kept that way so much. 1912 we shipped out 371 cars. This did not include any local freight shipments. We also shipped in 82 carloads of coal; this does not include other supplies that we got in, such as carloads of fire clay, reinforcing, wall ties, supplies for silo construction, etc.
Q. Can you give us any estimate in dollars and cents of what this amounted to; about what is the average?
A. That depends on the destination; the only way we could get it would be to take and figure them out.
Q. What proportion of your shipments have been moved over the C. & N. W.?
A. I would say three-quarters.
Q. Of course, the original haul in all cases would be over this line?
A. Yes.
Q. What is the freight on a carload of silos shipped out?
A. That depends on what the size of the car is; from these figures you can see that we handle between four hundred and fifty and five hundred carloads in 1912; since that time we have been doing much better.
Q. Do you use Illinois coal?
A. No.

Mr. Mills: How far north in Minnesota have you shipped your silos?

A. We have shipped as far as Brandon and Pelican Rapids; and then we have shipped silos to North Dakota.

Cross-examination.

By Mr. Brown:

Q. What has been your experience with the derailment of cars operated over the spur track to the old plant?

36 A. A year ago or so we had more trouble than now. They would bring cars in here without brakes and they would get away, and there was no way to stop them; we have to block them with pieces of wood or stone. I have been afraid that one of them would get away and have been there every day personally when any switching is being done, and we have not had any accidents lately. I do not mean to say that I am the reason for it, altho- I am there every day to caution the boys; it is a very dangerous place.

Mr. Mills: That is on account of the curves and not the track?

A. Yes, the grade; you can not hardly hold a car anyway.

Mr. Erickson: Mr. Brown, is there any question about the feasibility of this proposed sidetrack?

Mr. Brown: Yes. I do not concede the feasibility of it; I want to see what the expense will be before passing upon it. It is possible to build the track, but whether it would be practicable or feasible to do so, as outlined in Exhibit "A" on account of the expense, I do not know. The cost may surprise me.

Mr. Erickson: Would the Commission make some estimate?

Mr. Mills: We will have an engineer down there.

Mr. Brown: If the Commission, please; I do not see there is any dispute about the facts here. You have seen the plant and the grounds and track, and I would request that this hearing be continued to some time after we can get this estimate. Possibly we might want a further hearing at St. Paul.

Mr. Mills: We can just hold the proposition open and one of the Commissioners may come down here, or we may have it in St. Paul. I will have our engineer communicate with the railway people and come down here.

37 (Mr. Brown, reading:) Further hearing at St. Paul on October 20, 1915, before Commissioner Mills.

Mr. A. C. Ochs, testimony continued.

Examination by Mr. Erickson:

Q. Mr. Ochs has gone over his testimony and there are some things in there which he would like to correct. Mr. Ochs, you have gone over the transcript of testimony in this case, have you?

A. Practically, yes.

Q. Have you found anything in the transcript that you would like to correct?

A. Yes.

Q. You make such explanation as will correct it.

A. On page 2 Mr. Erickson asked me, "Can you give any idea of the extent of the business of the brick yard in the past, about the number of cars of brick that have been shipped out of here?

A. The first year we shipped out 25 or 30 and then we ran up to

300 or 350; something like that. I believe we got a capacity of 3 to 4,000 brick when we are running full time; there is coal shipped in here, too." Now, later on it says—the answer to this question should have been 43 to 45,000 on one day's work.

Mr. Erickson: That surely is wrong again.

Mr. Brown: Thirty to forty thousand, may be.

Mr. Erickson: Yes; it is corrected later on.

Q. What you wish to correct is the figure or statement that your capacity is only 3 to 400; it should be 43 to 45,000?

A. Yes. On page 3 Mr. Erickson asked the capacity of our plant and I answered that when weather permits we can make 43 to 45,000. On page 9:

Q. "About how soon do you expect to commence to turn out product? How soon do you expect to have it in operation?

A. We expect to begin operating the new plant, it will be about two weeks after we shut down the old one because there is a lot of machinery will not be put in until the spur line is built."

38 That is not so, we cannot take the old machinery out and rearrange the other machinery until we shift the machinery in the old plant. I think that is all.

Mr. Erickson: Perhaps we better have Mr. Ochs clear that up.

Mr. Brown: There is a question on page 14 of the original transcript, as follows: "Q. Do you expect to assume part of the expenses (referring to the expense of installing the track)? A. Yes." Mr. Ochs, that question was asked you and you answered 'yes'; was that the way you intended to answer? You meant to say 'no,' did you not?

A. Yes.

Q. The question should read this way. Q. Do you expect to assume any part of the expense? A. No. (Expense of installing the track.)

Mr. Ochs: We were talking about what I intended to do, not now, that was before I told them I would do the grading.

Mr. Mills: You think the company ought to pay all the expenses of putting that track in, except the right of way?

A. I did, before I had a little different proposition.

Q. That is your position before the Commission?

Mr. Erickson: Our position is this. We realize that——

Mr. Brown: Let me finish, please. Are you willing, Mr. Ochs, to pay or to assume any portion of the expense of installing this track? You can say 'yes' or 'no.'

Mr. Erickson: If I may object to that question.

Mr. Brown: Withdrawn.

Mr. Erickson: I can state Mr. Ochs' position. We are willing to do all the grading according to plan No. 1 of the Commission's engineer, or as amended——

Mr. Brown: Mark that.

39 Mr. Erickson: I think that is attached to the order.

Mr. Brown: ——or as amended by the alternative plan herewith submitted, as prepared by Mr. F. D. Minium, Engineer of New

Ulm, if such plan should be more acceptable to the railway company; providing, of course, that this would end the litigation.

Mr. Brown: Have the plan that you refer to marked as an exhibit.

Marked "Complainant's Exhibit No. 2."

Mr. Brown: Have the plan that you refer to marked Exhibit "A." That is the Minium plan, is it?

Mr. Erickson: This offer we make, of course, without prejudicing our right before the Commission in case it should not be accepted by the railway.

Mr. Brown: In order to make that proposition clear, will you state what the expense of grading is according to the Commission plan first mentioned, if you can. Is it shown on the plan?

Mr. Erickson: Not on No. 1; that is No. 2, where the retaining wall——

Mr. Brown: State what the expense is of grading under the first alternate of your proposition.

Mr. Erickson: It is in the report of the engineer.

Q. What is it, in dollars?

A. 910 cubic yards fill at 25c	$227.50
610 cubic yards fill at 10c	264.00
Total	$491.50

Mr. Brown: That is the amount that you are prepared to assume under the first plan?

Mr. Erickson: We do not know whether this estimate is correct, or not. We may be able to do it cheaper; we would not want to pay that amount of money out in cash, and we would want to have the privilege of doing the grading.

40 Q. What is the amount in the alternative plan that you spoke of, prepared by the New Ulm engineer?

A. I do not think we have any figures for that, but I can have him give an estimate of what it will cost.

Mr. Brown: Will you have him do that?

A. Yes.

Mr. F. D. Minium, being duly sworn, testified as follows:—

Examination by Mr. Erickson:

Q. What is your occupation?

A. Engineer and surveyor.

Q. I show you Exhibit No. 2, being an alternate plan in connection with plan No. 2 of the Railroad and Warehouse Commission's engineer, showing a slight variation in the location of the sidetrack. Can you give any estimate of the amount or cost of grading for the location of these tracks as you have laid them out on your plan?

Mr. Erickson: Now, let's get that out here.

Mr. Brown: I do not know whether it was offered in evidence.

Mr. Erickson: Yes, we will offer it now.

Mr. Brown: That is Complainant's Exhibit 2.

A. They would be about 25 per cent less than the first estimate or plan No. 1, as submitted by the Warehouse Commission's engineer.

Mr. Brown: How much in money?

A. About $100.

Q. Less?

A. Yes.

Q. How much would that make the expense?

A. About $400.

Mr. Brown: I will say at this time that the railway company, in order that the Commission may understand the respondent's position, that the proposition to install the tracks and the applicant paying the expense of the grading is declined.

Mr. Erickson: Mr. Minium, have you had any experience
41 in surveying with railroad companies?

A. Some.

Q. You may state what length of time and for what companies you worked along those lines?

A. My first experience was railroad location with the Great Northern in the west, about nine or ten months; next I was with the South Dakota Central in construction for about two years; with the D. L. & N. W. about three months; on location with the M. & St. L. for about seven months.

Q. You were called out to Mr. Och's brick yard for the purpose of re-arranging or devising some plan which would overcome the objections of the Railroad Commission engineer in regard to the curves, were you not?

A. Yes.

Q. Did you go over the plan No. 1 and the objections found by the Railroad engineer with a view to correcting some of the objections in regard to the sharp curves and reverse curves?

Mr. Flannery: It is the map from Jurgenson.

Mr. Erickson: Jurgenson's plan 1.

A. I did some work going over the plan and record submitted.

Q. This Exhibit No. 2, did you prepare this exhibit; this plan as shown on Exhibit No. 2?

A. I did.

Q. What is the sharpest curve in that plan?

A. Seven degrees and twenty minutes.

Q. And what is the sharpest curve in that plan No. 1 of the Railroad Commission?

A. Twelve degrees and thirty minutes.

Q. And what is the sharpest curve on the tracks as they are now at present located?

A. Twelve degrees, twenty minutes is the sharpest curve on the existing siding.

Q. In this reverse curve of the present sidetrack which is serving the Ochs Brick Yard, what is the length of the tangent in that?

A. A few feet; some thirteen or fourteen feet.

Q. What is the length of the tangent in your new plan
42 which you are submitting?

A. It would be a little over 200 feet; it would be something like—do you want it exact?

A. As near as you can give them?

A. Two hundred and three feet.

Q. This change which you have made brings the side track up closer to the hill, does it not, or nearer to the top of the hill?

A. Yes, it brings it up the hill considerably.

Q. It would do away with the filling and grading to a considerable extent?

A. Yes.

Q. And would it require the moving of the buildings—some or any of the buildings—barn and shed?

A. Yes.

Mr. Erickson: I may state we are willing to do that to move them to make way for this sidetrack. If the Commission should consider this a more feasible plan, and also it might be stated that arrangements will be made to connect the new side track as laid out by Mr. Minium, if the Commission would approve that plan. The change, as proposed by Mr. Minium, will not call for any expense on the part of the railway company, so far as moving of buildings is concerned; we will do all that at our own expense.

Q. Have you surveyed the grades of other railroads and sidetracks to other industries in the past?

A. Yes, at intervals.

Q. And are you familiar with the necessities or requisites of these sidetracks, so far as the grades are concerned—that is, do you know what kind of curve is feasible and what is not feasible for operating a line of road?

A. Yes.

Q. In your opinion, is the plan which you have prepared, a feasible plan?

A. It is.

Q. Is plan No. 1 of the Railroad Commission a feasible plan?

A. Yes.

Q. Are there on the C. & N. W. in Brown County any side-
43 tracks at present which have curves or gradients which render them less feasible than this?

A. There are.

Q. You may state any such that you have in mind?

A. The only ones are the Eagle Roller Mill Company at New Ulm.

Q. Have you a plat of the New Ulm sidetrack to the Eagle Roller Mill Company with you?

Mr. Brown: There is no question about the facilities of industry plants, so far as curves are concerned. We do not want to lumber up the record with that kind of testimony. I object to any opening up of that subject.

Mr. Erickson: My understanding from the record was that the railway company had objected to the feasibility of this plan.

Mr. Erickson: The record of the engineer stated that it would be a rather severe operating proposition.

Mr. Brown: That is the Commission's engineer?

A. Yes.

Mr. Brown: Mr. Jurgensen, there is an objection to using two curves—it was excessive curves?

Mr. Jurgensen: We raised no objection to *to* curves it was excessive gradient primarily that the objection was made on.

Mr. Erickson: Can this gradient be remedied to some extent, Mr. Mimium?

A. Yes; by the alternate proposition to some extent; I think Mr. Ochs could have lower end of this track raised a foot, if necessary.

Q. You go around a different way; how does the gradient on plan No. 1 compare with the gradient of the track being used by the Eagle Roller Mill Company?

A. Taking the curve itself into consideration the grade is a little bit heavier; on the other hand, taking the grade into consideration, the grade is lower and the curvature considerably more.

Q. Which is which?

A. The grade is lighter and the curvature considerably more.

44 Q. On the Eagle Roller Mill track?

A. Yes.

Q. On the Eagle Roller Mill track the grade is steeper?

A. The grade is less and the curvature greater.

Q. This track which we refer to, the Northwestern put in at the Eagle Roller Mill, when was that put in?

A. Last year.

Q. What difference is there in the gradient? Is there much of a gradient on that track?

A. 1.8 at the Eagle Roller Mill.

Q. Which do you consider the most difficult track to operate, the one which the Northwestern built last year for the Eagle Mill or the track according to plan on plat No. 1 of the Commission's engineer?

A. There is not a great deal of difference between the two.

Q. Have you made a survey of the track at the Eagle Roller Mill in New Ulm?

A. No, I have a plat.

Q. We offer it in evidence.

Mr. Brown: No objection.

Mr. Ochs recalled:

Mr. Erickson: Now, the plat is received.

Mr. Brown: Strike out the words 'no objection.' I do not see what we want to lumber up the record with this. Objected to as incompetent, immaterial and not admissible under the pleadings and involving an outside issue.

By the Court: I think I will sustain the objection.

Mr. Erickson: Well now, at this juncture, we will offer in evidence complainant's Exhibit 2; that is the Minium plat. No, we will offer in evidence, Exhibit 1, that is the Minium plan.

By the Court: Exhibit 2 is Minium's plan; that is in evidence?

Mr. Erickson: Yes.

By the Court: Both 1 and 2 are in evidence.

Mr. Erickson: We will offer it at this time.

Mr. Erickson: There is one point I want to bring out that
45 was overlooked last time. There is some question or suggestion on the part of the Commission about the desirability of more right of way.

Mr. Mills: That is the record of the engineer: that a less expensive track could be built with more right of way.

Q. Mr. Ochs, in buying this right of way for the track according to whose instructions or suggestions did you go in buying this right of way? Were some stakes set out for you to go by?

A. Yes.

Q. Who set them there?

A. The engineer that was sent up by Mr. Boyle of the Northwestern. In buying the right of way we want it understood that we bought it to comply with what the railway company considered necessary.

Mr. Brown: We do not concede that the railway company ever gave you any estimate of what they considered necessary or at any time has it been intimated that they would build the track without the payment of the cost by the applicant. Any surveys that we made were made as a mere preliminary to getting at the expense to the applicant. Do not try to have it understood that it was with a view of getting the company to build the track at its own expense. It was a mere accommodation on the part of Mr. Boyle sending an engineer there—a courtesy extended to Mr. Ochs.

Mr. Erickson: I bring this out in connection with the feasibility of the proposition.

Mr. Brown: I think it is explained.

Mr. Ochs: When I attempted to build that plant I wanted to know whether I needed any more ground to put in a sidetrack, so I wrote Mr. Boyle, I think, and he asked me whether it was a track extension or whether it was a new one. I believe I wrote him that part would have to be moved and we wanted a new track and we
wanted to know if we needed any more land, so we could
46 buy it. So a few days later an engineer came along sent by the railway company; I asked him to put down stakes and then I got Mr. Minium to follow those stakes in laying out the track according to the survey made by the railway company.

Mr. Erickson: The only thing we want to bring out is that any objection at this time raised by the railway company to the feasibility of this track, or in case Mr. Ochs has not enough right of way, or has not bought enough land, should not be raised by the

company, because we bought what they thought was proper at the time. That is the position we take.

Q. Mr. Ochs, all the other tracks which you have ever laid at this plant, your present sidetrack, who put them in, you or the railway company?

A. The railway company, whenever I asked for a track, told me they would send an engineer out; the first track I never asked for.

Q. Who put them in, you or the railway company?

A. The railway company; and I had to do the grading.

Mr. Brown: When were these tracks—that is cross examination.

Cross-examination.

By Mr. Brown:

Q. When were these tracks put in, the old ones you speak of; what year?

A. The first one was put in 24 or 25 years ago. Then we put in the next one 5 or 6 years later.

Q. All over twenty years ago?

A. No, we had an extension put in a few years ago.

Q. What was the extension?

A. It was extended 300 feet.

Q. That is the coal track?

A. Yes.

Q. All these tracks are on your own land, except what is on the railroad company's right of way?

A. Yes.

47 Q. The proposed track and the old track?

A. Yes.

Q. After the engineer of the company came out and set those stakes, Mr. Boyle or some one representing the company sent you an application for a sidetrack at the point, did they not?

A. I do not understand——

Q. They sent you a blank to make application for a track?

A. Yes.

Q. And you declined to sign it when you returned it?

A. I think there was an agreement——

Q. Exactly; it should be put in at your expense?

A. Yes.

Q. And you declined it and returned it?

A. Yes.

Witness excused.

Mr. Erickson: I would like to call Mr. Wagen for a little cross examination.

Mr. H. J. WAGEN, sworn and examined.

Mr. Brown: I object to any cross examination of *any* witness.

Mr. Mills: I assume that Mr. Wagen will tell the truth.

Mr. Erickson:——

H. J. Wagen, witness on the stand.

Examination by Mr. Erickson:

Q. The company's answer in this case sets out that it is the custom or policy of the company to require all industries of this kind to pay for their own sidetrack; I want to ask Mr. Wagen if that is true?

A. As far as I know, yes.

Q. How long has that been the policy of the company?

A. I could not give you any exact dates on that, only I remember that I think the first collection I ever made was from the Cobden mill when I first went on the road.

48 Q. Cobden was required to pay for their sidetrack?

A. Yes.

Q. This custom or policy, does that cover only new industry tracks, or does it cover re-arrangement of tracks when re-location or re-arrangement of tracks is required at an old industry?

Mr. Brown: Before answering that, respondent objects to any evidence as to what the company has done in other cases on the ground that it is immaterial and has no real bearing.

Mr. Brown: That objection we make now.

By the Court: Objection overruled.

Mr. Mills: That may be; but he can answer it.

A. As I say, is it the custom; I have not found it any different. Of course, as far as I am concerned, my work in this connection—it is my duty to send out a blank application as I did in this case, and they are sent back and I send them to Chicago. The engineer's office makes an estimate and the collection is made; that is all there is as far as I am concerned.

Q. Who handled the estimate that was made for the track that was put in at the Eagle Roller Mill last year?

A. I think I handled part of that.

Q. Did the C. & N. W. or the Eagle Roller Mill Company pay for that?

Mr. Brown: Objected to as immaterial. Same objection insisted here.

By the Court: Objection overruled.

Mr. Mills: He can answer it.

Mr. Brown: Note an exception in these cases.

A. I think the C. & N. W. paid for it. Probably some reason for that, we can explain why.

Q. Has the C. & N. W. paid for any other sidetracks or spurs to industries located on its railway in the state in the last four or five years besides the Roller Eagle Mill track?

A. I do not recall any; we were forced into that at New Ulm by our competitors.

49 Q. That is a hypothetical question, but assuming that there was a competing road out at the Ochs Plant, would Mr. Ochs receive better treatment than he is being accorded?

Mr. Mills: That is a matter of argument. Mr. Wagen, how much

would it cost you to furnish us with a statement of the shipments out of this point?

A. So far as the gross is concerned the earnings covering Mr. Ochs' plant we could prepare that in our office; of course, I do not know if that would be fair as it would only give the entire earnings. We could get the details from Chicago showing the net.

Q. How long would it take?

A. A week or ten days.

Q. Will you get that for us, please?

A. The net and gross for how long?

Mr. Mills: For one year.

A. Yes.

Mr. Erickson: There is one thing Mr. Ochs called to my attention and that by comparison with the Eagle Roller Mill that flour is shipped, whether it is milled or not. If the clay is not taken out of the clay bank it would not be shipped. It creates business for the railway company.

Mr. Mills: Mr. Ochs, you use the track for carrying on your tile business?

(Here Mr. Ochs must apparently be on the stand.—Reporter.)

A. Yes, and brick and clay products—make all kinds of fire brick.

Q. Is the track used for any other than your business?

A. The track is used by us principally.

Q. Have they been used for any other purpose?

A. In the agreement or contract they reserve the right to put their business on the track and have done it; ties and other things. They have unloaded rails but it is principally for my business.

50 Mr. Brown: This must be my examination. This is my examination of Mr. Ochs.

Cross-examination.

By Mr. Brown:

Q. If you were to take your industry away what becomes of the track?

A. It would be taken up, no doubt; they would have no use for the track at all.

Q. Your understanding is that if you go out of business the track will go, or would the railway company have the right to continue to use it if they wanted it?

A. It belongs to the railway company; that is in our agreement.

Q. That is in the agreement they sent you?

A. That is what they asked me; I should pay for the track and they own it.

Mr. Brown: Did you ever make any agreement with the company about this track in writing?

A. No.

Q. You have no agreement with the company?

A. I had a form sent me to sign.

Q. And declined to sign it?
A. Yes.
Q. Is your concern incorporated?
A. No.
Q. The Ochs Brick & Tile Company is a private individual?
A. Yes.
Q. It is owned by yourself?
A. Yes.
Q. It does not have any concern for anybody's business but its own?
A. Not at all.
Q. Now, this track is on your land, is it not, except what is on the railway company's right of way?
A. Yes.
Q. And you have had a carload of rails unloaded on that track; they were for your own use, were they not?
A. No they were for the main line.
Q. In their own work; they were rails to be used in the main track?
A. Yes.

51 Q. You did not mean to say that any rails or ties have been unloaded or stored on that track, they were for the company's own use, were they not?

A. Yes.
Q. Did any farmers ever use that track for a team track to unload stuff?
A. They have used it more or less for years.
Q. For unloading what?
A. For taking tile.
Q. Your own stuff? Was the track used to ship tile into your plant?
A. Yes.
Q. How often was that done?
A. We shipped at least 20 or 30 carloads the last month or two.
Q. That was consigned to your plant?
A. Yes.
Q. You were the consignee of those cars?
A. Yes.
Q. Were there ever any cars put on that track that were not consigned to your plant?
A. There were some.
Q. Name one and who it was there for?
A. I cannot recall it now.
Q. You cannot think about it now; you have been there right along all the time?
A. Yes.
Q. This plant is how far from the depot?
A. A quarter of a mile, I think; something like that.

Mr. Erickson: I want to ask you a question, Mr. Ochs; you were asked what use would be made of the track except by the Ochs Brick

& Tile Company; what other use do you expect to be made of that track after it is put in?

A. I can not say; I am not a prophet.

Mr. Erickson: At this time we want to incorporate this understanding into the record; that this track which Mr. Ochs seeks to have constructed—that we desire to furnish the right of way and when this track is constructed, so far as he is concerned, it shall be considered as part of the railway system and property of the C. & N. W. and subject to their use. Not entirely for his convenience but
52 used for the railway company's purposes so far as it does not unreasonably interfere with his use of the track.

Mr. Brown: I want to ask Mr. Boyle a question.

M. J. Boyle sworn, testified as follows:—

Examination by Mr. Brown:

Q. Mr. Boyle, you will note by all the plans—the company's engineer and the Commission's engineer, that there are two switches in the main track; how far are those switches from the station grounds? I think Mr. Ochs said over a quarter of a mile.

A. That is about half a mile from the depot to the house.

Q. The two switches would be about half and quarter of a mile from the depot, respectively?

A. Yes.

Q. How large is Springfield?

A. About two thousand.

Q. Has it station facilities; yards, sidetracks, industry tracks, etc.?

A. Yes.

Q. Team tracks?

A. Yes.

Q. I will ask you whether it has sufficient facilities for the shipments in and out of that community?

A. Yes, we have always taken care of it.

Q. What objection is there, Mr. Boyle, to switches being as there are in the main line, from an operating point of view?

A. There is a-ways an objection to switches in the main line; every switch you get increases your operating danger.

Mr. Mills: Every switch you put in the main line hurts it?

Mr. Brown: Mr. Boyle, I want to ask you this question; what other purpose have you for this track proposed, if *is* is put in, other than to serve the Ochs Brick & Tile Plant?

A. None whatever.

Q. If this track shown here should be installed as requested
53 by Mr. Ochs, what use would it be put to by the company outside of serving his plant?

A. Could not be put to any except for storing cars.

Q. Is it needed for that purpose?

A. No.

Mr. Mills: You are speaking of the present conditions, Mr. Boyle?

A. Yes.

Q. You do not know what may be done ten years from now?
A. No.

Mr. Erickson: You say that from an operating standpoint this matter of having two switches out there is objectionable?

(Mr. Brown: That is cross-examination.)

A. I did not say that—I said that every switch that you put in the main line increases the danger; something everyone tries to get away from.

Cross-examination.

By Mr. Erickson:

Q. But there has been this one switch in there for a great many years?
A. Yes.
Q. And what arrangement has the company had with Mr. Ochs in regard to keeping the switch lighted?
A. I do not think there is any agreement; I do not know of it.
Q. You do not know who attends to the switch lights?
A. As a general proposition our section men do, or the station force. I never knew of a contract being made for it; there may have been but I do not know of it.
Q. These plans that have been submitted; it would be possible to put in these spurs or sidetracks with one switch, would it not? It would increase the expense but it would be possible, would it not?
A. On your present arrangement you would not put them both on one switch.

54 Q. By extending that sidetrack which runs to the coal yard chute you can eliminate one switch on the main line, could you not?

A. I do not know, it might not be very economical.
Q. Would the elimination of one switch warrant the expense of building this additional amount of sidetrack?
A. Without giving it much consideration, I should say 'no.'
Q. You say, Mr. Boyle, that every additional switch increases the danger, especially on the main line?
A. Yes.
Q. I want to ask whether the additional danger from one additional switch would be great enough to justify the extension of this sidetrack clear to the west end of the yard to connect with the proposed spur and thereby eliminate one switch? That is, whether or not the extra expense of eliminating one switch would be warranted by the danger you would eliminate?
A. I would say 'no.'
Q. You have on the main line several plants and industries located somewhat outside of the local yards?
A. Yes.
Q. Stone quarries?
A. Yes.
Q. And those have switches in the main line?

A. Yes, every one has at least one.

Q. Stockyards; are they on separate spur or on the main track?

A. They are on the right of way, but would not be on the main line proper.

Q. In several towns along the line of the Chicago & Northwestern you have stockyards and oil tanks and such things, with separate switches to the main track, have you not?

A. Yes; but not very many.

Mr. Brown: That is redirect examination.

Redirect examination.

By Mr. Brown:

Q. The Ochs Brick & Tile Company is located on the main line from Chicago to Rapid City, is it not?

A. Yes.

55 Q. Trains are limited trains?

A. Yes.

Mr. Erickson: It has been brought out that you are the sole owner of this plant, Mr. Ochs, and that it is an individual enterprise; what plans have you for the incorporation of this company?

Mr. Erickson: You better have it "Mr. Ochs recalled."

Mr. Brown: Let's see if it goes on. Yes.

A. C. Ochs, recalled:

Mr. Brown: I object to it as being incompetent.

Mr. Mills: I suppose, Mr. Erickson, we will have to deal with what we have and not what may happen in the future. It does not make any difference to us whether he is an individual or whether the company is incorporated.

Mr. Jurgenson: Did not the Commission's engineer consider the plan proposed by Mr. Minium today, and you objected strenuously to any proposition that would disturb your barn and your son's house, and they were obliged to give it up because of your protest?

A. I told them to go around the other way. I asked them if it would be cheaper and they said it would be shortening the track; I did not object strenuously.

Mr. Brown: Mr. Minium, what is the gradient of this proposed track, this new track?

A. Maximum is 2%.

Q. You also say the saving would be 25 per cent; about how much in money?

A. About $100.

Q. Would not the cost of moving the barns and buildings more than offset the $100 saving in gradient? Mr. Post, can you tell from the Exhibit 2, can you make an estimate of what the cost of the new revised track would be?

A. No, I cannot.

56 Mr. Brown: Has Mr. Minimum made an estimate?

A. 25% less.

Q. Has that line been staked out so we can go down and cross-section the ground?

A. It has not been; we laid out at intervals to get levels and get an estimate.

Mr. Mills: Can you give us an idea how much it will cost to build this new track that you have laid out, except by saying it will be 25% less than the Commission's estimate?

A. No.

Mr. Erickson: In order to settle this controversy about the grading, Mr. Ochs will at this time in any order the Commission may make, if the Commission will make an order, to lay out the track according to this plan No. 1, or the alternate plan of Mr. Minium, Mr. Ochs will consent that he be required to do the grading and remove the buildings.

Mr. Brown: I do not think any of the engineers will have any difference in the amount of rails or ties or the cost of applying them. That expense will be approximately the same. If the Court please, without wishing to be put in the position of declining or accepting any proposition that I do not know what it will cost, I do say we decline it, but would like to say this, we can send our engineer down there and Mr. Jurgenson in a few days can send a man and see what the track will cost and have something on which to work.

Mr. Mills: Mr. Jurgenson will do that.

Mr. Brown: That is all.

Mr. Erickson: Well, we will now offer in evidence the findings and order of the Commission, being Exhibit 3.

Mr. Brown: The findings and order; why do you offer that in evidence?

Mr. Erickson: Well, the law makes that prima facie evidence.

Mr. Brown: To that offer the respondent or appellant, the
57 railway company, appellant, objects on the ground that—upon the several grounds separately set out in paragraph 9 of the answer; namely,—I will let that stand.

Mr. Erickson: Have you rested?

Mr. Brown: There is no need of resting here. I am through, according to the testimony; unless there is something else.

Mr. Erickson: Have those findings been certified?

Mr. Brown: Oh, yes.

Mr. Erickson: Well, then this would be marked Exhibit 3. Now, Exhibit 2, that is Mr. Minium's plat. We will offer that.

Mr. Brown: That is in.

Mr. Erickson: No, that never got in; we offer it at this time, Exhibit 2.

Mr. Brown: You substitute copies for all of those, Mr. Flannery, so it will not disturb the Commission record.

Mr. Flannery: Yes.

Plat marked Exhibit 4, being the alternate plan No. 1 of the Rail-

road and Warehouse Commission's engineer. And the estimate accompanying the same.

Recess taken to 1.30 p. m.

A. C. Ochs, sworn in his own behalf:

Direct examination.

By Mr. Erickson:

Q. You are the complainant in this case, Mr. Ochs?

A. Yes, sir.

Q. What progress has been made on this new brick and tile plant since the last hearing in this case?

A. Well, we have practically built—well, we have finished eight kilns now so far; and we have finished all the buildings and the machinery nearly all in except the motors; the motors are not
58 yet in; we have got the generators—well, practically all the machinery except the lines for the electricity; we haven't got yet.

Q. I show you Exhibit 5 and ask you whether that is a true photograph in representation of the eight kilns; the eight new kilns, which will be served by this new sidetrack?

A. Whether these are all the kilns?

Q. Yes?

A. Yes, six kilns that we built for no other purpose than for the new plant.

Q. And the building back of that, is that the large building shown on this plat here?

A. Yes, that is the building.

Mr. Flannery: Refer to the plat.

Q. Exhibit 2?

A. Yes.

Q. The large new building, and these are the——

A. These are the kilns here shown; on here; they are still annexed.

Q. So that the track would go right along in the foreground here, in front of the kilns?

A. Yes sir.

Mr. Erickson: We offer that in evideence.

Mr. Brown: Let me see it.

Mr. Erickson: Offer it so as to give the Court some idea.

Mr. Brown: Objected to as incompetent, immaterial.

By the Court: Oh, I will overrule the objection.

Exception by appellant.

Q. Now, in the previous hearing there was something said about expecting to be ready about October; when do you expect to have the new plant in operation?

A. Well, owing to the trouble we had to get our motors, we don't expect to be ready now to do anything before spring opens.

Q. Well, have you already burned some brick in these new kilns?

A. We burned two kilns; yes.

Q. But that was to test them out more than for anything else?

A. The reason we burned those two kilns, I had them con-
59 structed according to an idea of my own, and a party who had a system of another kind, he was going to prove to me that he had a better fire brick and a more economical one to make them, and I told them to build those two kilns—burn those two kilns and we had to haul them down in the wagon and started the same day for a test; that is the reason we burned them; but we couldn't use those from those kilns; we had our factory wagons but we couldn't haul them down in them, had to take wagons and then we couldn't get them in there; they broke to pieces before they burned it; we couldn't get the green wall down there.

Q. Are these new kilns on this photograph there at the present time supplied with any sidetracks?

A. Yes.

Q. You figure then that this spring *you that* are able to operate the new plant?

A. Yes sir.

Q. Now this order, the Railway & Warehouse Commission's order requires you to do certain things, a certain amount of grading and cutting down trees, etc., has any of that been done?

A. We have grubbed out the trees, cut them down and we have practically all the grading done except near the kilns, there was so much material lying around there we couldn't do anything then; we couldn't get through the frost was so deep in the ground we had to give the grading up; but I think—oh, seven-eighths of the grading is done.

Q. Has the business been incorporated; has a corporation been formed?

A. Yes sir.

Q. But has any transfer yet been made of the business to the corporation?

A. Well, the corporation is started January first; but we have not transferred any business to it on account of the uncertainty of what the transfer costs and we wanted to start with a certain capital stock and when we know that, what the plant will cost and what money we need to operate it.

60 Q. The corporate name is the same name; is the name which you have been using and are using in this case?

A. Yes.

Mr. Brown: I do not see any materiality in this; I do not want to object; that is, if it is of any length, I do.

Mr. Erickson: Well, it won't be long.

Mr. Brown: If you want to substitute the corporation at any time, you may do so.

Mr. Erickson: We will some time later; when the business has been transferred.

Q. Now, when did you first ask for this track; was it before you started to build this new plant or did you ask for the track after you had it started?

A. I asked for the track before we started.

Q. Did you know before you started to build the new plant that the company objected to put in at their own expense this sidetrack?

A. No, I never—no, I wasn't sure; I thought they would be pleased to put it in and that there would be no trouble about it.

Mr. Brown: I move to strike out "I wasn't sure; I thought they would be pleased to put it in" as being a matter of his own notions and opinions and not responsive.

By the Court: May be stricken out.

Q. You had no assurance that they would put in this track when you started this plant; new plant, did you?

A. Why, I asked for it, whether they would give me a plant from the superintendent so there would be no trouble——

Q. A track, you mean?

A. A track; I asked for a surveyor out there and the surveyor surveyed it and told me I had to have a little more land and I bought the land on the strength of that and they never charged me more than the grading before and I thought it was done the same way this time.

61 Mr. Brown: I move that that be stricken out; that answer, as not responsive.

Mr. Brown: Read the question. Question read.

A. Yes, I had an assurance; the superintendent promised me——

Mr. Brown: I ask that that also be stricken out.

By the Court: Yes, may be stricken out.

Mr. Brown: The whole of this—I don't know anything about putting in this testimony under our stipulation. If you put this in then I will ask for a further hearing to put in some extra testimony. He said he had no assurance on the main hearing; now he testifies he was promised they would put the track in——

A. That is what the superintendent said——

Mr. Erickson: My question was as to assurances of having it put in at the company's expense; he didn't have——

Mr. Brown: Did you have any assurance that this track would be put in at the company's expense any time before——

A. No.

Mr. Brown: That is all right now.

Q. Now when this track is completed, Mr. Ochs, do you make any claim to the exclusive use of this track?

Objected to as incompetent, immaterial; calling for an opinion and conclusion of the witness.

Objection sustained.

Q. Could this track be used by the company for any other purpose except serving your industry?

Objected to as incompetent, immaterial, and on the ground as calling for the opinion of the witness.

Mr. Brown: It is for the Court to say whether it could be or not; as a matter of law.

Mr. Erickson: Well, I refer not to whether it could be
62 legally used; but whether it could be actually used.

Mr. Brown: Same objection.

By the Court: I think the situation there has been fully shown by the testimony; whether he thinks it could or could not, wouldn't make any difference.

Q. The land on the south side of the track and on the east side of the plant, by whom is that owned?

A. By Ferdinand Schwartzrock.

Q. Are there any deposits of sand on that land?

Objected to as incompetent, immaterial, not within the issues of the pleadings.

Objection sustained. Exception by complainant.

Mr. Erickson: We offer to prove that there are natural conditions on the south and east side of the track which would make it possible for other industries, such as the furnishing of sand for the manufacture of clay products, to spring up and that such industries can be served by this sidetrack.

Objected to on the ground that it is incompetent, immaterial; not admissible under the pleadings.

By the Court: Oh, I think that is conjectural; objection sustained. Exception by complainant.

Mr. Erickson: We also offer to prove by this witness and by the line of questioning which has just been offered, that there are clay deposits east of these kilns, these new kilns, on the land of Ferdinand Schwartzrock, whilhe could be served by an extension of this sidetrack.

Objected to as incompetent, immaterial, not admissible under the pleadings; no foundation laid; speculative.

Objection sustained. Exception by complainant.

Q. Mr. Ochs, would it be feasible and practicable for the
63 railway company to spot cars on this new sidetrack for the benefit of farmers living to the east and northeast of your brickyard who might have carload shipments of goods or produce to ship to themselves for the purpose of unloading? Whether it would be more convenient for them and make a shorter haul for them to unload them at these sidetracks than it would be if the cars are spotted on the sidetracks in the station yards at Springfield?

Objected to as incompetent, immaterial, not admissible under the pleadings; witness not shown himself competent to testify to that and on the ground that it is speculative and involving a knowledge of switching and the management of the railroad company, etc.; the question of whether there is a switch engine there and all that; particularly on the ground that the witness is not qualified to testify; no showing that farmers are shipping bulk carload lots in or out.

Mr. Erickson: Well, I think that is a thing the Court will take judicial notice of.

Objection sustained. Exception by complainant.

Mr. Erickson: That is all.

Cross-examination.

By Mr. Brown:

Q. Mr. Ochs, I want to call your attention to the plat, blue print, which is attached to the order of the Commission, and which shows the tracks as they are and as they are proposed; those tracks are all on your land, are they not? Except what are on the right of way?

A. Yes, they are all on my land; here is the city limit; right here is the city limit.

Q. I asked you, they are all on your land?

A. Yes, they are all on my land, except these east.

64 Q. Except what are on the right of way?

A. Yes.

Q. The right of way margin is indicated by a white line, north and south of the track?

A. Yes.

Q. You own the land south of the tracks, don't you?

A. Yes; I own the land down here; yes.

Q. You own the land south of it?

A. No, I own about 200 or 225 feet south here.

Q. And you own land east of the tracks?

A. Yes, I own about——

Q. For how many feet?

A. Well, may be that is four, five hundred feet.

Q. And you own land west of the tracks?

A. No, I don't own anything here; nothing here at all; this land up here is what I bought; this is Schwartzrock's land, all along here.

Q. But you bought a little corner here coming in from the west switch?

A. Yes; this here.

Mr. Erickson: You did not buy as far as this?

A. Yes, it is marked there; with a little line; that is a quarter line; no, here, here; that is as far as I bought.

Q. Now Mr. Ochs, you never had at any time, did you, in any way, any assurance or promise from the railroad company that they would put this track in to you at the company's own expense, did you?

A. No, no.

Q. No; you have been assured at all times that the company would put a track in if you would reimburse it for the net cash outlay in doing so, haven't you?

A. Well, repeat that again.

Q. You have at all times understood that the position of the company was, and is, that it would put this track in substantially as you have it or wanted it, provided you would pay the net cash expense of putting it in? That has been your understanding, hasn't it?

A. No, my understanding was this, that they was going
65 to do it under the same terms as they done it before, that I was to do the grading——

Mr. Brown: No, no; strike out the question and answer——

Mr. Erickson: We object to the striking out of the question and answer.

Mr. Brown: Read the question. Question read.

A. And they was to furnish the material and labor and I to furnish the material and labor for the grading; that is the way I——

Q. The way you understood it?

A. Yes.

Q. But no man from the company ever told you they would do it or agreed to do it at their own expense, did they?

A. I never asked for it.

Q. No one ever agreed to do that, did they; yes or no?

A. No.

Q. And then you never had any assurance that they would do it, free of cost to you?

A. Never had any assurances, but I assumed it.

Q. Oh, yes; assumed it; that was your own notion; that is your own notion but that does not amount to anything. That is all.

Witness excused.

Testimony closed.

Mr. Brown: Appellant at this time moves the Court to vacate and set aside the order of the Commission appealed from, on the ground:—

1. That the appellant is under no legal obligation or duty to complainant to construct and maintain the trackage in question at its own expense or without due compensation being first duly made or secured to pay therefor.

2. That the order as it stands, requiring the construction and maintenance of the trackage in question at the railway company's own expense, or at the expense of the railway company for any
66 part thereof, is contrary to and violative to the laws of Congress, which governs and regulates the conduct of the instrumentality of the railway company in the premises as an interstate carrier as a railroad.

5. That the order in question for the construction and maintenance of such trackage at the expense of the appellant, without compensation being first made or secured to it, for the construction and maintenance of said track, is violative of the constitution of the state of Minnesota in that, that the enforcement of such order would deprive the railway company of its property without due process of law and deny to it the equal protection of the law.

4. That such order for the construction of the track and the bearing of part of the expense by the carrier, if enforced, would be violative of the constitution of the United States, and particularly to the fourteenth amendment thereof, in that it would deprive the railway

company of its property without due process of law and deny to it the equal protection of the law.

5. On the further ground that the order is unreasonable and unlawful.

I hereby certify that I have examined the foregoing proposed settled case and find the same conformable to the truth and that the same is a true and correct transcript of all the evidence offered or received at the trial of said cause, together with all objections, exceptions and rulings made thereon or taken thereto, and all proceedings had at the trial of said cause, and the same together with all of the exhibits included or referred to therein and identified as Exhibits "A," "2," "3," "4," and "5," is hereby certified and allowed
67 and ordered and filed with the clerk of this court as the settled case herein.

Dated April 22, 1916.

I. M. OLSEN,
District Judge.

Findings and Order.

(Title.)

This is an appeal from an order of the Railroad and Warehouse Commission of the State of Minnesota, made on the 13th day of November, 1915, fixing the terms upon which a sidetrack to complainant's industry shall be constructed and ordering the respondent to construct the same upon such terms.

The appeal was heard before this court at New Ulm, Minnesota, on the 29th day of January, 1916, pursuant to stipulation of the parties. Mr. Aug. G. Erickson appeared as attorney for the complainant, Lyndon A. Smith, Attorney General, and Henry C. Flannery, Assistant Attorney General, appeared for and on behalf of the State of Minnesota and the Railroad and Warehouse Commission. And Messrs. Brown, Abbott & Somsen appeared as attorneys for the respondent. Evidence was presented and heard and oral arguments presented and thereafter written briefs were submitted by the attorneys for each party and the case submitted to the court for decision.

Now after due consideration of the evidence presented and the return, findings and order of the Commission, and hearing and considering the arguments and briefs presented by counsel for each party, the court finds the following facts:

1. That for more than twenty years last past the complainant has owned and operated a brick manufacturing plant at the Village of Springfield in this county and state, adjacent to the right of
68 way and railway of the respondent, and has manufactured and shipped therefrom large quantities of brick and tile in carload lots over respondent's railway, and shipped in fuel and other supplies in carload lots. That respondent during all of said time has provided and operated a spur or sidetrack, partly upon its right of way and partly upon the property of the complainant, for the use

of said brick plant in shipping out its products and in shipping in fuel and material in carload lots.

That at the time of the filing of his petition the complainant was engaged in enlarging his said plant to about double its capacity and building what amounted to a new plant for the manufacture of brick and tile adjacent to and upon the same premises as his old plant. That in order to operate said new plant properly and to advantage it is necessary to re-arrange the sidetracks, and to build what amounts to a new sidetrack to said plant and place a new switch in respondent's main track, and thereby part of the old sidetrack may be taken up or moved to the new location, but leaving two connections with respondent's main line where there is now only one such connection. That the location of said sidetracks and switches and the changes to be made therein is correctly shown upon the blue print map attached to the order of the Commission and marked Exhibit "A," which map is hereby made a part of this finding.

2. That the complainant and respondent were unable to agree upon terms for the change and building of said sidetracks. That thereupon the complainant presented his petition to the Railroad and Warehouse Commission of this state to determine the matter. That after due notice to the respondent two hearings were had before said Commission, at each of which the respondent appeared and took part; the last of said hearings being held at St. Paul, Minne-
69 sota, on the 20th day of October, 1915. That thereafter and on the 13th day of November, 1915, said Railroad and Warehouse Commission made and filed its findings of fact and order herein.

That the order so made is as follows:—

"Complainant to furnish the right of way and give respondent a deed or agreement conveying to respondent the right of the perpetual use of said right of way for railroad use; complainant either to do the grading required for the putting in of the new track or pay respondent for the same; also that complainant pay for the readjustment, raising or resetting of telephone poles, if necessary, and dismantling or removing any buildings that is necessary in the construction of this track and all grubbing that is necessary, and that all the other expense for materials required or work or labor done in the construction of said track shall be paid for by respondent."

"It is therefore ordered that within thirty (30) days after complainant shall perform the conditions that it is hereby required to perform or agree to pay respondent upon the completion of the track the amount of the engineer's estimate for the same as shown in Exhibit "B," respondent construct the track to complainant's industry as the same is laid out and shown on Exhibit "A."

3. That the Exhibit "B" referred to in said order shows that the total expense of changing and building said sidetrack amounts to $2,298.71, exclusive of cost of right of way. That the grading and other items to be performed or paid for by the complainant amount to $747.50, leaving $1,551.21, as the amount of expense to be borne by the respondent. That it further appears that the complainant

has expended the sum of $210.00 for necessary right of way outside of his own premises.

4. Further facts in reference to the amount of traffic done
70 and to be done by complainant with the respondent, from this plant, and other facts, are found in the commissioners findings but need not be here restated, as there appears little, if any, dispute as to the facts.

5. The respondent, before the Commission and again before the court, presents as its defense and objection to the order:

(*a*) That the respondent is under no legal obligation or duty to construct and maintain the sidetrack without compensation.

(*b*) That the order interferes with and constitutes an unlawful burden upon interstate commerce.

(*c*) That the order violates the constitution of this state because it amounts to a taking of respondent's property for a private purpose, or, if the taking be held to be for a public purpose, then it is a taking without compensation paid or secured.

(*d*) That the order violates the 14th amendment to the Constitution of the United States for the same reasons, and is not due process of law. And the statute under which the Commission acted is unconstitutional under the State and Federal constitutions.

(*e*) That the order is unreasonable and unlawful.

It is conceded that the respondent is an interstate railroad and engaged in both inter-state and intra-state commerce as a common carrier.

6. The court finds that the order of the Railroad and Warehouse Commission of the State of Minnesota, herein appealed from and hereinbefore set forth is lawful and reasonable, and is sustained by the evidence. And the objections thereto by the respondent are overruled.

As conclusions of law from the facts found, it is considered by the court that the complainant is entitled to and have judgment herein
that the order of the Railroad and Warehouse Commission of
71 the State of Minnesota, herein appealed from, made on the 13th day of November, 1915, be and stand affirmed.

Let judgment be so entered.

Dated March 31, 1916.

I. M. OLSEN,
District Judge.

Memorandum.

The dispute here is whether or not the State, through its Railroad and Warehouse Commission can constitutionally require a common carrier to bear a part of the initial cost of a sidetrack to an industry where such industry is found justly entitled to such track.

The Commission acted within the terms of our statute, so it follows that if the order made is unlawful it must be because the laws under which the Commission acted are invalid and unconstitutional.

That the furnishing of sidetracks to industries at or near railway stations when reasonably necessary, is a public matter, and the taking

of private property for such purpose is a taking for public use, is well settled in this state. And it is so held by the Supreme Court of the United States in the Union Lime Co., case in 233 U. S. 211.

This power of eminent domain, inherent in the state, is usually delegated to common carriers and public service corporations. This power would remain a naked and useless power unless the state had the further power to command the carrier to exercise it and make use of and operate the sidetrack after the right of way had been taken. For the state or its agents to take property for a sidetrack and the carrier have the power to decline to use or operate it would, of course, be absurd. So we are forced to conclude that the state also has the inherent power to command the carrier to operate and make
72 use of the track whenever the necessity is found to exist for the taking of property for such purpose.

It is apparent then that the state has the inherent power: first, to take private property for the construction of such sidetrack, when it is found necessary and reasonable; second, to command the carrier to operate it.

This power to command the carrier to act or operate probably may be placed under the police power of the state. But it is the existence of the power and not its name which is important.

There remains the question whether or not the state, in the exercise of these inherent powers, can constitutionally require the carrier to assume any of the initial expense of providing the track.

That may be a doubtful question. It may be sufficient to say that before this court should hold the law in question unconstitutional on that ground it should be very clearly satisfied that the law is invalid.

The law here in question, chapter 28, G. S. 1913, so far as it relates to this proceeding, is, in some respects, very general and somewhat lacking in specifications. It clearly provides for ample notice to the carrier and for a full hearing before the Commission, and before the court on appeal. It then provides in sec. 4284 and 4231, that the carrier shall furnish sidetracks to industrial plants at or near its stations adjacent to its right of way as shall be required. And that any such industry, entitled to connection with the railway, if it can not agree with the carrier as to terms, may apply to the Railroad and Warehouse Commission, and, after due notice to the carrier, have a hearing before the Commission, and the Commission shall fix the terms upon which the sidetrack or connection is to be furnished.

The law will no doubt be liberally construed so as to avoid constitutional objections if that can reasonably be done. So con-
73 strued may it not be held that the questions of whether or not the industry is entitled to the sidetrack; whether or not it is reasonably necessary; whether or not it can with safety to other traffic be built; the reasonableness and necessity therefor, are questions delegated to the Commission to determine. And that when it comes to fixing the terms the Commission is to look to and be governed by the constitution and general laws of this state as to such questions.

If the law be held constitutional then the remaining question is whether or not the Commission in this case could lawfully require the respondent to bear a portion of the expense of the track.

It is a well established principle in the law of this state that property benefited by a public improvement, such as drains, streets and roads, and other improvements, may be required to pay for the benefits conferred directly upon the property by the improvement. And if the property is both benefited and damaged the damages may be offset against the benefits.

I do not believe it is trenching upon the realm of speculation to say that direct connection by sidetrack with large and active industrial plants is a direct benefit to railway lines. A railway line in this state with a number of direct connections by trackage with large and prosperous industries would be of much greater market value than a like line without such connections. If the industries were there but had no track connections they would not prosper and the carrier would suffer and its property be of less value. If the respondent's railway were on the market its sidetrack to this plant, which it will own as part of its railway line, would directly increase the market value of its property. So it would not seem speculative to say that the building of this track will be a direct and immediate benefit to the respondent. And that the commission in fixing the terms
74 might not unreasonably take such benefit into consideration.

I agree with respondent's counsel that the future freight receipts are compensation for future services and probably can not be considered as any compensation for putting in the track. But as to the direct and immediate benefit to the railway because of its acquiring the sidetrack as a part of its railway line, that would seem to be different. The truth would seem to be that the industry and the railway each receive a direct and immediate benefit in the enhanced market value of both the plant and the railway line by the building of the sidetrack. And it does not clearly appear that it is either unlawful or unreasonable to require them to share the expense.

The fact that the State of Minnesota is not eo nomine a party to this proceeding is, of course, not important. The order was made by the Railroad and Warehouse Commission, an agency of the state, and the state is a real party in interest.

I. M. OLSEN, *Judge.*

Judgment.

(Title.)

This is an appeal from an order of the Railroad and Warehouse Commission of the State of Minnesota, made on the 13th day of November, 1915, fixing the terms upon which a sidetrack to complainant's industry shall be constructed and ordering the respondent to construct the same upon such terms.

The appeal was heard before this court at New Ulm, Minnesota, on the 29th day of January, 1916, pursuant to stipulation of the parties. Mr. Aug. G. Erickson appeared as attorney for the complainant. Lyndon A. Smith, Attorney General, and Henry C. Flan-

nery, Assistant Attorney General, appeared on behalf of the
75 State of Minnesota and the Railroad and Warehouse Commission. Messrs. Brown, Abbott & Somsen appeared as attorneys for the respondent. Evidence was presented and heard and oral arguments presented and thereafter written briefs were submitted by the attorneys for each party and the case submitted to the court for decision.

Now after due consideration of the evidence presented and the return, findings and order of the Commission, and hearing and considering the arguments and briefs presented by counsel for each party and the court having made and filed its findings of fact and conclusions of law and ordered that judgment be entered pursuant thereto,

It is hereby adjudged and decreed that the facts are as follows:

1. That for more than twenty years last past the complainant has owned and operated a brick manufacturing plant at the Village of Springfield in this county and state, adjacent to the right of way and railway of the respondent and has manufactured and shipped therefrom large quantities of brick and tile in carload lots over respondent's railway and shipped in fuel and other supplies in carload lots. That respondent during all of said time has provided and operated a spur or sidetrack, partly upon its right of way and partly upon the property of the complainant, for the use of said brick plant in shipping out its products and in shipping in fuel and material in carload lots.

That at the time of the filing of this petition the complainant was engaged in enlarging his said plant to about double its capacity and building what amounted to a new plant for the manufacture of brick and tile adjacent to and upon the same premises as his old plant. That in order to operate said new plant properly and to advantage it is necessary to re-arrange the sidetracks and to build what amounts to a new sidetrack to said plant and place a new switch in
76 respondent's main track, and thereby part of the old sidetrack may be taken up or moved to the new location, but leaving two connections with respondent's main line where there is now only one such connection. That the location of said sidetracks and switches and the changes to be made therein is correctly shown upon the blue print map attached to the order of the Commission and marked Exhibit "A," which map is hereby made a part of this finding.

2. That the complainant and respondent were unable to agree upon terms for the change and building of said sidetracks. That thereupon the complainant presented his petition to the Railroad & Warehouse Commission of this state to determine the matter. That after due notice to the respondent two hearings were had before said Commission, at each of which the respondent appeared and took part; the last of said hearings being held at St. Paul, Minnesota, on the 20th day of October, 1915. That thereafter and on the 13th day of November, 1915, said Railroad & Warehouse Commission made and filed its findings of fact and order herein.

That the order so made is as follows:

"Complainant to furnish the right of way and give respondent a

deed or agreement conveying to respondent the right of the perpetual use of said right of way for railroad use; complainant either to do the grading required for the putting in of the new track or pay respondent for the same; also that complainant pay for the re-adjustment, raising or resetting of telephone poles, if necessary, and dismantling or removing any buildings that is necessary in the construction of this track and all grubbing that is necessary, and that all the other expense for materials required or work or labor done in the construction of said track shall be paid for by respondent."

"It is therefore ordered that within thirty (30) days after
77 complainant shall perform the conditions that it is hereby required to perform or agree to pay respondent upon the completion of the track the amount of the engineer's estimate for the same as shown in Exhibit "B," respondent construct the track to complainant's industry as the same is laid out and shown on Exhibit "A."

3. That the Exhibit "B" referred to in said order shows that the total expense of changing and building said sidetrack amounts to $2,298.71, exclusive of cost of right of way. That the grading and other items to be performed or paid for by the complainant amount to $747.50, leaving $1,551.21 as the amount of expense to be borne by the respondent. That it further appears that the complainant has expended the sum of $210.00, for necessary right of way outside of his own premises.

4. That facts in reference to the amount of traffic done and to be done by complainant with the respondent, from this plant, and other facts, are found in the commissioner's findings but need not be here re-stated, as there appears little, if any, dispute as to the facts.

5. The respondent, before the Commission and again before the court, presents as its defense and objection to the order:—

(*a*) That the respondent is under no legal obligation or duty to construct and maintain the sidetrack without compensation.

(*b*) That the order interferes with and constitutes an unlawful burden upon inter-state commerce.

(*c*) That the order violates the constitution of this state because it amounts to a taking of respondent's property for a private purpose, or, if the taking be held to be for a public purpose, then it is taking without compensation paid or secured.

(*d*) That the order violates the 14th amendment to the
78 Constitution of the United States for the same reasons, and is not due process of law. And the statute under which the commission acted is unconstitutional under the state and federal constitutions.

(*e*) That the order is unreasonable and unlawful.

It is conceded that the respondent is an interstate railroad and engaged in both inter-state and intra-state commerce as a common carrier.

6. The court finds that the order of the railroad and warehouse commission of the State of Minnesota, herein appealed from and hereinbefore set forth is lawful and reasonable and is sustained by the

evidence. And the objections thereto by the respondent are overruled.

It is hereby further adjudged and decreed that from the foregoing findings of fact the complainant is entitled to and have judgment herein that the order of the Railroad and Warehouse Commission of the State of Minnesota, herein appealed from, made on the 13th day of November, 1915, be and stand affirmed and that the respondent pay the sum of $8.30 as clerk's fees determined by stipulation.

Witness the Honorable I. M. Olsen, Judge of the said District Court at New Ulm, Minnesota, this 22nd day of April, 1916.

[District Court Seal.]

CARL P. MANDERFELD, *Clerk*.

Notice of Appeal.

(Title.)

To Honorable Lyndon A. Smith, Attorney General; Henry C. Flannery, Assistant Attorney General; August G. Erickson, and C. P. Manderfeld, Clerk of the District Court:

Please take notice, that the above named respondent, Chicago & North-Western Railway Company, appeals to the Supreme
79 Court of the State of Minnesota from the judgment of said District Court entered herein on the 22nd day of April, 1916, in favor of said complainant and against said respondent, in which judgment the order of the Railroad & Warehouse Commission therein referred to and made on the 13th day of November, 1915, was affirmed. This appeal is taken from the whole thereof.

Dated April 22, 1916.

BROWN, ABBOTT & SOMSEN,
Attorneys for Respondent, Winona, Minnesota.

Due and personal service of the above notice of appeal is hereby acknowledged this 22nd day of April, 1916, and complainant hereby waives any bond or undertaking upon this appeal, and hereby agrees that all further proceedings in this action shall be stayed in all respects pending said appeal.

LYNDON A. SMITH,
Attorney General.
AUG. G. ERICKSON,
Attorney for Complainant.
C. P. MANDERFELD,
Clerk of District Court.

(Endorsed:) Filed May 8, 1916. Carl P. Manderfeld, Clerk of District Court, Brown County, Minn. Filed May 15, 1916. I. A. Caswell, Clerk.

80 STATE OF MINNESOTA:

Supreme Court, April, 1916, Term.

In the Matter of the Complaint of A. C. Ochs, Doing Business under the Name of A. C. Ochs Brick & Tile Company, Respondent,

vs.

Chicago & Northwestern Railway Company, a Corporation and Common Carrier, Appellant.

Assignments of Error.

The court erred in ordering and rendering judgment herein that the order of the Railroad and Warehouse Commission made on November 13, 1915, is sustained by the evidence and reasonable and lawful, because

1. G. S. 1913, sec's 4284 and 4231, pursuant to which said order is made and upon which the same is based, would be violative of both the federal and state constitutions in that such enforcement would

(*a*) Deprive the appellant Chicago & Northwestern Railway Company, of its property without due process of law,

(*b*) Take the property of said Railway Company without its consent for a private purpose,

(*c*) Take the property of said Railway Company without its consent and without compensation,

(*d*) Deprive said Railway Company of the equal protection of the laws. (pp. 65-6, 70, ff. 514-18, 339.)

2. Said order and judgment affirming the same, if enforced herein, would be violative of both the state and federal constitutions for each of the reasons separately and last above specified.

3. That the said Railway Company cannot be legally compelled to rearrange, construct or maintain the trackage in question without its consent and without compensation, or at its own expense in whole or in part, as required by the judgment herein.

4. Said judgment sustains the Railroad & Warehouse Com-
81 mission in an attempted exercise of an assumed authority unwarranted by law and contrary to the constitution, both state and federal.

5. Said judgment sustains the Railroad & Warehouse Commission in its holding and order which, if enforced herein, would unlawfully and directly interfere with congressional control of interstate commerce and the instrumentalities thereof as the same is carried on by said Railway Company and unlawfully burden the same.

6. The court further erred

(*a*) In finding as follows: "The court finds that the order of the Railroad and Warehouse Commission of the State of Minnesota, herein appealed from and hereinbefore set forth is lawful and reasonable, and is sustained by the evidence." (p. 70, f. 339.)

(*b*) In concluding and holding as follows: "As conclusions of law from the facts found, it is considered by the court that the complainant is entitled to and have judgment herein that the order of the Railroad and Warehouse Commission of the State of Minnesota, herein appealed from, made on the 13th day of November, 1915, be and stand affirmed." (pp. 70-71, f. 340.)

BROWN, ABBOTT & SOMSEN
Attorneys for Appellant, Winona, Minn.

(Endorsed:) Filed Nov. 11, 1916. I. A. Caswell, Clerk.

82 Brown County.

Taylor, C.

A. C. Ochs Brick & Tile Co., Respondent,

vs.

C. & N. W. Ry. Co., Appellant.

Syllabus.

1. Where a sidetrack becomes a part of the trackage of a railroad to be operated as a part of its railway system, the taking of property therefor is a taking for a public purpose.

2. The state under its police power may require a railroad company to provide such sidetrack facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable.

Affirmed.

Opinion.

Complainant has operated a brick and tile manufacturing plant adjacent to the tracks of the railway company at Springfield in Brown county for about twenty-five years, and has continuously shipped out large quantities of its products and shipped in fuel and other materials. During all that time the railway company has provided and operated spur or sidetracks to the plant. In the fall of 1914, complainant began the construction of an additional plant adjacent to the old plant, at an expense of about $150,000, which will double the former capacity of the plant. Complainant applied to the railway company to change and extend the spur or sidetracks so that they will serve both the old and the new plants. The railway company offered to make the desired changes and additions if complainant would bear the entire expense thereof, but refused to do so except upon that condition. Thereupon complainant presented the

matter in due form to the railroad and warehouse commission
83 which ordered a hearing, and both parties appeared and took part therein. As a result of the hearing the commission among other things found that, "there was no dispute that this trackage was necessary for the proper operation of complainant's plant, the only question presented being upon what terms it should be constructed. * * * "Terms found to be reasonable are as follows: Complainant to furnish the right of way and give Respondent a deed or agreement conveying to Respondent the right to the perpetual use of said right of way for railroad use; Complainant either do the grading required for the putting in of the new track or pay Respondent for the same; also that Complainant pay for the readjustment, raising or resetting of telephone poles if necessary, and dismantling or removing any buildings that is necessary in the construction of this track and all grubbing that is necessary, and that all the other expense for materials required or work or labor done in the construction of said track shall be paid for by Respondent." The commission ordered the railway company to construct the trackage within thirty days after complainant had performed the conditions to be performed on its part. The railway company appealed to the district court where the case was tried anew and judgment rendered affirming the order of the commission. An appeal from that judgment brings the matter before this court.

The railway company still manifests its readiness to construct the trackage, if complainant will bear the expense thereof, but insists that the company cannot be compelled to bear any part of such expense.

At the outset the company lays down the unquestioned proposition that its property cannot be taken for private use, and asserts that requiring it to construct this trackage takes its property for private use. The order requires the right of way to be conveyed to the railway company; and the right of way together with the tracks thereon will be the property of the railway company and become a part of its railway trackage to be operated as a part of its railway system. Property taken for such purposes is taken for a public use. Union Lime Co. v. C. & N. W. Ry. Co. 233 U. S. 211; State v. C. M. & St. P. Ry. Co. 115 Minn. 51, and cases cited therein.

The company seems to contend that even if the construction of a sidetrack to an industry adjacent to its right of way be an appropriation of property to a public use, yet the changes in the tracks
84 and the additions thereto here in question are not for a public use but for complainant's private benefit. Where the owner makes such an addition to his plant that additional trackage is necessary we are unable to make any distinction in principle between the duty to furnish a sidetrack to the original plant and the duty to furnish it to the new plant. The new or additional plant can stand in no worse position because constructed by the owner of the old plant than if constructed by some one not connected therewith. The company also argues that the proposed tracks can serve only a private purpose for the reason that they will be surrounded by private prop-

erty and there is no highway by which the public can gain access to them. Whenever such highway is necessary, it can be provided.

The principal contention of the company, however, is that it cannot be compelled to bear any part of the expense of constructing the proposed sidetrack without infringing the constitutional inhibition against taking private property for public use without compensation. The question is whether the state under its police power may require the company to provide such sidetrack facilities to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable, without compensation to the company other than the enhancement in the value of its property which will follow from the sidetracks becoming a part of such property and from the additional business brought to the company. That the additional business brought to the company will be of a substantial amount in this case appears from the fact that complainant paid the company more than $10,000 in freight charges during the year preceding the initiation of these proceedings and that the addition to the plant will more than double its output. The necessity for the sidetracks if complainant is to operate its plant successfully
85 is not questioned; and, if the expense therefor may be apportioned between the industry and the railroad, the reasonableness of the apportionment is not questioned. The position of the company is that it cannot be required to bear any part of such expense.

The company relies largely upon the decision of the United States Supreme Court in Missouri Pac. Ry. Co. v. Nebraska, 217 U. S. 196. The statute under consideration in that case required the railroad company to construct sidetracks at its own expense, when application was made therefor, without any opportunity whatever for a hearing as to the necessity or reasonableness of the proposed expenditure. Under our law the company cannot be required to construct a sidetrack until the commission, after a full hearing and a consideration of all the circumstances, has determined that its construction is necessary, and that the part of the expenditure therefor apportioned to the company is reasonable. If dissatisfied with the determination made by the commission, the company may have the entire matter reviewed by the courts. We think there is a wide difference between the questions involved here and those decided in the case cited.

Complainant relies upon the decision of this court in State v. Chicago, M. & St. P. Ry. Co. 115 Minn. 51. The facts involved in that case were so nearly like the facts involved in the present case, that we think the decision in that case determined the controlling questions in the present case. The same constitutional objection to the proceeding made in the present case was urged without avail in that case, and the doctrine of that case leads to an affirmance of the judgment in this case. The final solution of such problems rests with the Supreme Court of the United States, and we shall unhesitatingly apply the rule which that court shall establish; but we do not understand that that court has held that a state, in the exercise of its police power,

may not require a railroad to provide necessary sidetrack
86 facilities to an industry adjacent to its tracks upon such terms as shall be found to be reasonable under all the circumstances and after a full hearing, although such terms may impose a part of the expense therefor upon the railroad. See Union Lime Co. v. Chicago & N. W. Ry. Co. 233 U. S. 211.

Judgment affirmed.

TAYLOR, *C.*

Filed Jan. 12, 1917. I. A. Caswell, Clerk.

87 State of Minnesota, Supreme Court, October Term, A. D. 1916.

No. 77.

A. C. Ochs Brick & Tile Company, Respondent,

vs.

Chicago & Northwestern Railway Company, Appellant.

Pursuant to an order of Court duly made and entered in this cause January 12 A. D. 1917

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Ninth Judicial District, sitting within and for the County of Brown be and the same hereby is in all things affirmed.

And it is further determined and adjudged that the Respondent above named, do have and recover of said Appellant herein the sum and amount of Forty-seven and 00/100 Dollars ($47.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed January 29, A. D. 1917.

By the Court:

Attest:

I. A. CASWELL, *Clerk.*

Statement for Judgment.

Statutory Costs, $25.00; Printer, $21.75; Clerk, $—; Acknowledgments, $.25; Return, $—; Postage and Express, $—; Filing Mandate, $—. Total, $47.00.

88 State of Minnesota,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within

copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, Jan. 29, A. D. 1917.

[SEAL.] I. A. CASWELL, *Clerk.*

[Endorsed:] State of Minnesota Supreme Court. Transcript of Judgment. Filed Jan. 29, A. D. 1917. I. A. Caswell, Clerk.

89 [Endorsed:] No. 19942. State of Minnesota Supreme Court. A. C. Ochs Brick & Tile Company, Respondent, against C. & N. W. Ry. Co., Appellant. Judgment Roll. Filed January 29, 1917. I. A. Caswell, Clerk.

90 STATE OF MINNESOTA,
Supreme Court, ss:

I, I A. Caswell, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Respondent, vs. Chicago & Northwestern Railway Company, Appellant and also of the opinion of the court rendered therein together with the assignment of errors, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this March 14, 1917.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

91 In the Supreme Court of the United States.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

A. C. OCHS, Doing Business under the Name of A. C. OCHS BRICK & TILE COMPANY, Defendant in Error.

Assignments of Error.

Now comes the Chicago & North-Western Railway Company, plaintiff in error, and makes the following assignments of error which occurred in the hearing and determination of said cause in said Supreme Court, substantially affecting its rights, to-wit:

1. That said Supreme Court erred in holding that the judgment of the trial court affirming the order of the Railroad & Warehouse Commission of the state of Minnesota herein, ordering and requiring plaintiff in error, upon the right of way therefor being secured and

prepared by defendant in error, to construct, maintain and operate spur tracks extending from its main line of railroad to, and for the use of the manufacturing plant and industry of defendant in error, if enforced herein, was not a confiscation of the property of plaintiff in error and a deprivation of its property contrary to section 1 of Article XIV of the Amendments of the Constitution of the United States.

2. That said Supreme Court erred in holding that the judgment of the trial court, affirming the order of said Railroad & Warehouse Commission, ordering and requiring plaintiff in error to
92 remove, readjust, reconstruct, maintain and operate the said spur tracks as reconstructed from its said main line to and for the use and purpose of the said private plant and industry of defendant in error, if enforced herein, was not a taking and confiscation of the property of plaintiff in error for a private use and purpose in violation of section 1, article XIV, of the Amendments of the Federal Constitution.

3. That said Supreme Court erred in refusing to hold that the judgment of the trial court affirming the order of the said Railroad & Warehouse Commission, if enforced herein, would deprive plaintiff in error of its property without compensation and without due process of law in violation of section 1 of Article XIV of the Amendments of the Constitution of the United States.

4. That said Supreme Court erred in refusing to hold that said order, affirmed by the said judgment of the trial court, was unreasonable and unlawful in compelling the plaintiff in error to construct, maintain and operate said spur tracks without compensation and without due process of law and contrary to and violative of section 1, Article XIV of the Federal Constitution.

5. That said Supreme Court erred in refusing to hold that said order, affirmed by the trial court, was unreasonable and unlawful in compelling the plaintiff in error to remove, rearrange and reconstruct the spur tracks already maintained and operated from its main track to the said manufacturing plant of defendant in error and to operate the said tracks as reconstructed without compensation, was contrary to and violative of section 1, Article XIV of the amendments of the Federal Constitution.

93 6. That the said order of the Railroad & Warehouse Commission, appealed from in this case, and the judgment of the trial court affirming the same imposes an unjust burden upon and discriminates against interstate commerce and in favor of state commerce in violation of paragraph 3 of section 8 of Article I of the Constitution of the United States and the Supreme Court of the state of Minnesota erred in refusing to vacate and set aside said order of the Railroad & Warehouse Commission of the state of Minnesota and in entering judgment sustaining and affirming the same.

7. That the order of the Railroad & Warehouse Commission of the state of Minnesota appealed from in this case imposes an unjust and illegal burden upon interstate commerce and discriminates against such commerce and in favor of state commerce in contravention of the act of Congress entitled, "An Act to Regulate Commerce"

approved February 4, 1887, and acts amendatory thereof and is made particularly in contravention of sections 1, 2, 3, 6, 13 and 15 thereof as amended, and the Supreme Court of the State of Minnesota erred in refusing to vacate and set aside the said order of the Railroad & Warehouse Commission of the state of Minnesota and in entering its said judgment sustaining and affirming the same.

8. That said Supreme Court erred in not reversing the judgment of the trial court with instructions to such court to reverse and vacate the said order of the Railroad & Warehouse Commission and in thereby denying to plaintiff in error its rights under section 1 of Article XIV of the Amendments of the Federal Constitution and section 8 of Article I of the Constitution of the United States.

94 9. The state Supreme Court erred in affirming the judgment of the trial court and thereby refusing to hold that sections 4284 and 4231 of the General Statutes of Minnesota for 1913, and each of said sections, upon which the order of the said Railroad & Warehouse Commission, appealed from, is based, if enforced herein, would be violative of section 1, Article XIV of the Amendments of the Constitution of the United States for each of the following reasons; that is to say, such enforcement would:

(*a*) Take the property of the plaintiff in error without its consent for a private use and purpose;

(*b*) Take the property of plaintiff in error without compensation;

(*c*) Deprive the plaintiff in error of its property without due process of law;

(*d*) Deprive plaintiff in error of the equal protection of the law.

10. The said Supreme Court erred in affirming the judgment of the trial court and thereby holding that the state under the police power may require the plaintiff in error to maintain and operate the said spur or side track facilities without compensation and that said order of the Railroad & Warehouse Commission, if enforced herein, would not deprive the plaintiff in error of its property without compensation and without due process of law in violation of section 1, Article XIV of the Amendments of the Constitution of the United States.

11. That the state Supreme Court erred in affirming the judgment of the trial court and thereby holding that the state of Minnesota, in the exercise of the police power, may require plaintiff in error to construct the said spur track facilities and apportion

95 the expense of such construction between plaintiff and defendant in error, and that said order of the Railroad & Warehouse Commission to that effect, if enforced herein, would not deprive plaintiff in error of its property without compensation and without due process of law, and would not be violative of section 1, Article XIV, of the Amendments of the Federal Constitution.

12. That said Supreme Court erred in refusing to hold that the said judgment of the trial court, if enforced herein, would deny the plaintiff in error the equal protection of the law in violation of section 1, Article XIV, of the Amendments of the Federal Constitution.

Wherefore and for these and other manifest errors said Chicago &

North-Western Railway Company, plaintiff in error, prays that the judgment of said Supreme Court of the State of Minnesota, dated January 27, 1917, be reversed and set aside, and that judgment be rendered for the plaintiff in error granting to it its rights under the Constitution and Statutes of the United States and for judgment for its costs.

L. L. BROWN,
W. D. ABBOTT,
S. H. SOMSEN,
Attorneys for Chicago & North-Western Railway Company, Plaintiff in Error.

95½ [Endorsed:] 77/19,942. In the Supreme Court of the United States. Chicago & North-Western Railway Company, Plaintiff in Error, vs. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Defendant in Error. Assignments of Error. Filed Feb. 23, 1917. I. A. Caswell, Clerk. L. L. Brown, W. D. Abbott and S. H. Somsen, Winona, Minnesota, Attorneys for Plaintiff in Error.

96 In Supreme Court, State of Minnesota.

A. C. Ochs, Doing Business under the Name of A. C. Ochs Brick & Tile Company, Respondent,

vs.

Chicago & North-Western Railway Company, Appellant.

Petition for Writ of Error.

To the Honorable Justices of the Supreme Court of the State of Minnesota:

Your petitioner, the above named Chicago & North-Western Railway Company, respectfully shows that on the 27th day of January, 1917, the Supreme Court of the State of Minnesota rendered a final judgment against your petitioner in a certain case wherein your petitioner was defendant and said A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, was plaintiff, as will appear more fully by reference to the record and proceedings in the case, and that said court is the highest court of law or equity in said state in which a decision in said suit could be had; that by and in the said suit there was drawn in question the validity of a statute of and of an authority exercised under the state of Minnesota, on the ground that such statute and authority and each of them were and are repugnant to the Constitution of the United States, and that the decision and judgment of said Supreme Court of the state of Minnesota therein was and is in favor of the validity of such statute of and authority exercised under said state of Minne-
97 sota, and such decision and judgment of said court is against the right claimed by said Chicago & North-Western Railway

Company and, as it believes, repugnant and contrary to the Constitution of the United States and against the rights of said Chicago & North-Western Railway Company thereunder, all of which will more fully appear in detail from the assignments of error filed herein.

Wherefore said Chicago & North-Western Railway Company prays that a writ of error may issue to the Supreme Court of the State of Minnesota for the correcting of the error complained of and that a duly authenticated transcript of the record, proceedings and papers therein may be sent to the United States Supreme Court, and that such other and further proceedings may be had in the premises as may be just and proper.

February 23d, 1917

CHICAGO & NORTH-WESTERN RAILWAY COMPANY.
By L. L. BROWN.
W. D. ABBOTT.
S. H. SOMSEN. *Its Attorneys.*

97½ [Endorsed:] 19,942. In Supreme Court, State of Minnesota. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Respondent, vs. Chicago & North-Western Railway Company, Appellant. Petition for Writ of Error. Filed Feb. 23, 1917. I. A. Caswell, Clerk.

98 In Supreme Court, State of Minnesota.

A. C. Ochs, Doing Business under the Name of A. C. Ochs Brick & Tile Company, Respondent,

vs.

Chicago & North-Western Railway Company, Appellant.

Comes now the Chicago & North-Western Railway Company, appellant above named, on this 23d day of February, 1917, and files and presents to this court its petition praying for the allowance of a writ of error intended to be urged by it and praying further that a duly authenticated transcript of the record, proceedings and papers upon which the judgment herein was rendered may be sent to the Supreme Court of the United States and that such other and further proceedings may be had in the premises as may be just and proper; and upon consideration of said petition, this court desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions herein presented.

It is Ordered That a writ of error be allowed as prayed, provided, however, that said Chicago & North-Western Railway Company, appellant, give bond according to law in the sum of one thousand dollars, which bond shall operate as a supersedeas bond.

Witness my hand this 23d day of February, 1917.

CALVIN L. BROWN.
Chief Justice of the Supreme Court of the State of Minnesota.

98½ [Endorsed:] In the Supreme Court of the State of Minnesota. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Co., Defendant in Error, vs. Chicago & North-Western Ry. Co., Plaintiff in Error. Order Allowing Writ of Error. Filed Feb. 23, 1917. I. A. Caswell, Clerk.

99 In the Supreme Court of the United States.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,
vs.
A. C. OCHS, Doing Business under the Name of A. C. Ochs Brick & Tile Company, Defendant in Error.

Know all men by these presents:

That we, Chicago & North-Western Railway Company, a corporation organized and existing under the laws of the state of Illinois, as principal, and Hartford Accident and Indemnity Company, a corporation of the state of Connecticut, as surety, are held and firmly bound unto A. C. Ochs in the sum of one thousand dollars ($1,000), lawful money of the United States, to be paid to the said A. C. Ochs, his heirs, representatives and assigns, for the payment of which well and truly to be made we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed and dated this 20th day of February, 1917.

The condition of this obligation is such that whereas lately in the Supreme Court of the state of Minnesota, in a suit pending in said court, wherein A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company was respondent and Chicago & North-Western Railway Company was appellant, judgment was entered against said appellant and said appellant seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in said suit.

Now therefore, If the above named appellant, Chicago & North-Western Railway Company shall prosecute its said writ of error to effect and pay all costs and damage if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and effect.

100 [CORPORATE SEAL.] CHICAGO & NORTH-WESTERN RAILWAY COMPANY,
By R. H. AISHTON, *Its President.*

In Presence of:
BARRET CONWAY,
I. C. BELDING,
As to Railway Company.

[CORPORATE SEAL.] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By WILLIAM A. BAUMANN,
CARL G. BAUMANN,
Its Attorneys in Fact.

S. H. SOMSEN,
ANNABELLE ROSS,
As to Surety.

STATE OF ILLINOIS,
County of Cook, ss:

On this 20th day of February, 1917, before me personally appeard R. H. Aishton, to me personally known, who, being by me duly sworn did say that he is the President of Chicago & North-Western Railway Company, the corporation named in and which executed the foregoing instrument; that the seal to said instrument attached is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said R. H. Aishton acknowledged said instrument to be the free act and deed of said corporation.

[NOTARIAL SEAL.] MARGARET C. CARMODY,
Notary Public, Cook County, Illinois.

My Commission Expires April 6, 1917.

101 STATE OF MINNESOTA,
County of Winona, ss:

On this 21st day of February, 1917, before me personally appeared William A. Baumann and Carl G. Baumann, to me personally known, who, being by me duly sworn, do say, that they are the Attorneys in Fact of the Hartford Accident and Indemnity Company, a corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said William A. Baumann and Carl G. Baumann acknowledged said instrument to be the free act and deed of said corporation.

[Notarial Seal Winona County, Minn.]

S. H. SOMSEN,
Notary Public, Winona County, Minn.

My commission expires Jan'y 12, 1920.

102 19942.

In the Supreme Court of the United States.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

A. C. OCHS, Doing Business under the Name of A. C. Ochs Brick & Tile Company.

Bond.

L. L. Brown, W. D. Abbott, S. H. Somsen, Winona, Minnesota, Attorneys for Plaintiff in Error.

The within bond and the surety thereon is approved this 23rd day of February 1917.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

Filed Feb. 23, 1917. I. A. Caswell, Clerk.

103 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Minnesota before you, at the October, 1916, term thereof, being the highest Court of law or equity of the said state in which a decision could be had in the said suit, between A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Respondent, and Chicago & North Western Railway Company, Appellant, wherein was drawn in question the validity of a statute of and of an authority exercised under the state of Minnesota, on the ground that such statute and authority and each of them were and are repugnant to the Constitution of the United States, and the decision and judgment of said Supreme Court of the State of Minnesota was in favor of such their validity, manifest error hath *ah*ppened, to the great damage of said appellant Chicago & North-Western Railway Company, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in said Supreme Court, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right
104 and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 23rd day of February, in the year of our Lord One thousand nine hundred seventeen.

Done in the city of Saint Paul, county of Ramsey, state of Minnesota, with the seal of the District Court of the United States for the District of Minnesota attached.

[U. S. Dist. Court Seal, Dist. of Minnesota, Third Division.]

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

Allowed by—
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

1914 [Endorsed:] 19942. In the Supreme Court of the State of Minnesota. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Defendant in Error, vs. Chicago & North-Western Railway Company, Plaintiff in Error. Writ of Error. Filed Feb. 23, 1917. I. A. Caswell, Clerk.

105 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on February 23, 1917, in the matter of A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Respondent, vs. Chicago & North-western Railway Company, Appellant:

1. The original bond of which a copy is herein set forth:

2. Copies of the writ of error, as herein set forth,—one for each defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in St. Paul, Minnesota, this March 14, 1917.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

106 UNITED STATES OF AMERICA, *ss:*

The President of the United States to A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the state of Minnesota, wherein Chicago & North-Western Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. L. Brown, Chief Justice of the Supreme Court of the State of Minnesota, this 23rd day of February, 1917.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

I, the undersigned, attorney of record for A. C. Ochs, defendant in error in the action above entitled, hereby acknowledge due service of the above citation at Springfield, Minnesota, this 6th day of March, 1917.

AUG. G. ERICKSON.

106½ [Endorsed:] In the Supreme Court of the State of Minnesota. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Co., Defendant in Error, vs. Chicago & North-Western Railway Company, Plaintiff in Error. Citation to Defendant in Error. Filed Mar- 8, 1917. I. A. Caswell, Clerk.

107 In the Supreme Court of the United States.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, Plaintiff in Error,

vs.

A. C. OCHS, Doing Business Under the Name of A. C. OCHS BRICK & TILE COMPANY, Defendant in Error.

To the Clerk of the Supreme Court of the State of Minnesota:

In the action above entitled, please incorporate into the transcript of record, to be returned by you to the Supreme Court of the United States, all of the papers, pleadings, files, records and exhibits which have been or may be filed with you in said action.

Dated March 5, 1917.

L. L. BROWN,
W. D. ABBOTT,
S. H. SOMSEN,
Attorneys for Plaintiff in Error.

108 STATE OF MINNESOTA,
County of Winona, ss:

S. H. SOMSEN, being duly sworn, says that he is one of the attorneys for the plaintiff in error in the action above entitled; that on the 5th day of March, 1917, within the city of Winona, county of Winona, state of Minnesota, he deposited in the United States postoffice in said city a true and correct copy of the foregoing præcipe, duly enclosed in a sealed envelope and legibly addressed and directed to August G. Erickson, at Springfield, Minnesota; that said August G. Erickson then and there was, and now is, the attorney of record herein for the above named defendant in error and that said August G. Erickson then and there did and now does reside within said Springfield, Minnesota.

S. H. SOMSEN.

Subscribed and sworn to before me this 5th day of March, 1917.

[NOTARIAL SEAL.] ANNABELLE ROSS,
Notary Public, Winona County, Minn.

My commission expires Dec. 31, 1920.

108½ [Endorsed:] In the Supreme Court of the United States. Chicago & North-Western Ry. Co., Plaintiff in Error, vs.

A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Co., Defendant in Error. Praecipe. Filed Mar. 6, 1917. I. A. Caswell, Clerk.

109 UNITED STATES OF AMERICA,
Supreme Court of Minnesota, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Minnesota, at my office, in the city of St. Paul, Minnesota, this March 14, 1917.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL,
Clerk Supreme Court of Minnesota.

110 District Court, Ninth Judicial District.

STATE OF MINNESOTA,
County of Brown, ss:

A. C. OCHS, Doing Business Under the Name of A. C. OCHS BRICK & TILE COMPANY, Complainant,

vs.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, a Corporation and Common Carrier, Respondent.

Notice of Motion.

To Messrs. Brown, Abbott and Somsen, Attorney- for Respondent.

You will please take notice that on the pleadings, files and proceedings herein and the affidavit, a copy of which is herewith served upon you, the complainant will move the court at a term thereof to be held in the city of New Ulm on January 29, 1916, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order permitting the State of Minnesota and the Railroad and Warehouse Commission of the State of Minnesota to intervene and take part in the above entitled proceedings on the following grounds, to-wit: First, that the order which is appealed from in the above entitled proceedings is an administrative as well as a quasi-judicial order which was duly made by the the said Railroad & Warehouse Commission after a full hearing and careful consideration; Second, that the issues involved therein are of great public interest and importance and affect many citizens of the State of Minnesota other than the above named complainant; Third, that the interests of the State require that the State be represented

at and take part in the hearing of said proceedings; and for such other relief as may be just, with costs. The attached affidavit and the findings and order of the Commission and all papers in the above entitled proceedings which are on file with the clerk
111 of the above entitled court, will be read and used in support of this Motion.

Dated at St. Paul, Minnesota, this 21st day of January, 1916.

(Signed) LYNDON A. SMITH,
Attorney General, The Capitol,
St. Paul, Minnesota.

112 District Court, Ninth Judicial District.

STATE OF MINNESOTA,
County of Brown, ss:

A. C. OCHS, Doing Business Under the Name of A. C. OCHS BRICK & TILE COMPANY, Complainant,

vs.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY, a Corporation and Common Carrier, Respondent.

STATE OF MINNESOTA,
County of Ramsey, ss:

IRA B. MILLS being first duly sworn says:

That he is Chairman of the Railroad and Warehouse Commission of the State of Minnesota and that said Commission is an administrative body, having general supervision over the railroads of the State of Minnesota and express power to compel them to construct, maintain and operate side-tracks such as the one involved in these proceedings.

That the order appealed from in the above entitled proceedings is an administrative as well as quasi-judicial order, and the findings upon which said order is based, which are on file with the clerk of the above entitled court, were made by the said Railroad and Warehouse Commission after a full hearing, at which both complainant and respondent appeared and participated, and after careful consideration by the said Commission.

That the issues involved in said proceedings are of great public interest and importance and affect many citizens of the State of Minnesota other than the above named complainant; and that the interests of the State of Minnesota and of the Railroad and Warehouse Commission require that said State and said Commission be represented at and permitted to take part in the hearing of said proceedings.

[SEAL.] (Signed) IRA B. MILLS.

Subscribed & Sworn to before me this 22nd day of January, 1916.

(Signed) THOS. YAPP,
Notary Public, Ramsey County, Minnesota.

My commission expires May 5, 1920.

113 Endorsed: 6057. State of Minnesota, County of Brown. District Court, Ninth Judicial District. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company, Complainant, vs. Chicago & North-Western Railway Company, a corporation and common Carrier, Respondent. Notice of Motion. Affidavit. Due Service of this instrument and receipt of copy thereof admitted at — this — day of January, 1916. Brown, Abbott & Somsen, Attorneys for Respondent. Lyndon A. Smith, Attorney General. Filed May 8, 1916. Carl P. Manderfeld, Clerk of District Court, Brown County, Minn.

114 STATE OF MINNESOTA,
Supreme Court, ss:

I, I. A. Caswell, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the notice of motion to intervene in the cause therein entitled, as appears from the original, remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom, and of the whole thereof.

Witness my hand and seal of said Supreme Court at the Capitol, in the city of St. Paul, March 20, 1917.

[Seal of the Supreme Court, State of Minnesota.]

I. A. CASWELL, *Clerk.*

[Endorsed:] Chicago & North-Western Railway Co., Plaintiff in Error, vs. A. C. Ochs Brick & Tile Co., Defendant in Error. Amended Return.

Endorsed on cover: File No. 25,858. Minnesota Supreme Court. Term No. 1,028. Chicago & Northwestern Railway Company, Plaintiff in Error, vs. A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company. Filed March 27th, 1917. File No. 25,858.

No. 455 159

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,

vs.

A. C. OCHS, DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK & TILE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR.

INDEX

CASES CITED

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,

vs.

A. C. OCHS DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK & TILE COMPANY.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF CASE.

Plaintiff in Error, the Railway Company, owns and operates a line of railway, with the usual hundred foot right of way, running east and west through Springfield station, a village of about 1500 inhabitants (Rec. 6), in Brown County, Minnesota. For about twenty-six years Defendant in Error, A. C. Ochs Brick & Tile Company, has owned and operated a brick and tile manufacturing plant in the township of Burnside, in that county, adjacent to the main line (Rec. 37) of railway between stations (Rec. 11, 12, 18), surrounded by farm land and about a quarter of a mile easterly from the Railway Company's Springfield station (Rec. 34), which concededly provides all facilities necessary for handling the business thereat. There is no question here about the duty of the Railway Company to provide sufficient stational tracks. (Rec. 20.)

About twenty-six years ago when the brick plant was started, the Railway Company furnished, and has since maintained, private spur trackage for its use and it has during this time shipped in and out substantial quantities of fuel supplies and product. (Rec. 6.) The brick plant is on no other line of railroad (Rec. 6). The brick company owns the land upon which its plant is located (Rec. 20, 31, 34), and that immediately surrounding the same so that neither the present tracks nor those demanded are reached by any public road or can be approached by the public generally (Rec. 55 56). The old trackage was (Rec. 34) and the new is for the sole use of this plant (Rec. 14, 15, 20, 21, 33).

During the fall of 1914, the brick company commenced construction of an addition to or enlargement of its plant at an expense of about $150,000, and which would double the capacity, and at about that time applied to the railway company to construct new trackage which would meet and serve the plan and purpose of the enlarged plant, in the manner determined upon by the brick company, not the railway company (Rec. 3), and requiring an extra switch connection with the main line of road, two switches instead of one (Rec. 1 3, 18). The demand is not that the Railway Company provide trackage to serve this plant, but that it construct, maintain and operate certain tracks for that purpose, according to the plan of the brick company. The blue print, which is a copy of Exhibit "A" and made a

part of the Commission's order (Rec. 6), attached gives a birdman's view of the trackage, old and new.

The plan requires the removal of practically all the old tracks and the construction of other and new tracks. It is not a mere re-arrangement or modification of the old tracks. (Exhibit A.)

The railway company was ready and offered to construct and operate the new tracks if the brick company would bear the out-of-pocket expense thereof; otherwise it refused to do so. (Rec. 4–5, 7.)

The brick company then presented the matter by petition to the state Railroad & Warehouse Commission (Rec. 1–3), which after hearing, at which the railway company indicated its readiness to construct the trackage provided the brick company would bear the actual expense thereof (Rec. 4), but insisting that it should and could not be compelled to construct the same at its own expense (Rec. 4–5), found, among other things that

> "There was no dispute that this trackage was necessary for the proper operation of complainant's plant, the only question presented being upon what terms it should be constructed, * * * Terms found to be reasonable are as follows: Complainant to furnish the right of way and give Respondent a deed of agreement conveying to Respondent the right to the perpetual use of said right of way for railroad use; Complainant either do the grading required for the putting in of the new track or pay Respondent

for the same; also that Complainant pay for the readjustment, raising or resetting of telephone poles if necessary, and dismantling or removing any buildings that is necessary in the construction of this track and all grubbing that is necessary, and that all the other expense for materials required or work or labor done in the construction of said track shall be paid for by Respondent." (Rec. 5-7.)

The estimated cost of the trackage was made by the Commission, the detail of which is shown on the Commission's Exhibit B (Rec. 8), amounting to $2298.71, the work to be done or paid for by the brick company amounting to $747.50, leaving $1551.21 as the amount of expense to be borne by the railway company.

The railway company timely appealed to the District Court (Rec. 9) where there was a re-trial and a judgment rendered affirming the order of the Commission (Rec. 10-52). By appeal from that judgment the case was presented to the Supreme Court (Rec. 52) where the same was affirmed. Ochs vs C. & N. W. Ry. Co., 135 Minn. 323 (Rec. 54-7). The writ of error to that court brings the case here (Rec. 65).

ASSIGNMENTS OF ERROR

The Supreme Court of Minnesota, it is respectfully submitted, erred:

1. In ordering and rendering judgment herein sus

taining the judgment of the trial court, which affirmed the order of the Railroad & Warehouse Commission, for the reason that the statute, as construed by said Supreme Court and on which proceeding and order are based, to-wit: Sections 4284 and 4231, General Statutes of Minnesota, 1913, is violative of secton 1 of Article XIV of the Amendments of the Federal Constitution, in that the same would, if enforced herein,

(a) Take the property of Plaintiff in Error for a private use without its consent;

(b) Deprive Plaintiff in Error of its property without compensation;

(c) Take the property of Plaintiff in Error without due process of law;

(d) Deprive Plaintiff in Error of the equal protection of the law.

2. In ordering and rendering judgment herein sustaining the judgment of the trial court, which affirmed the order of the Railroad & Warehouse Commission, requiring Plaintiff in Error upon the right of way therefor being secured by Defendant in Error, upon over its land, to construct, maintain and operate spur tracks connecting with and extending from its main track over and across its land and right of way to and onto the land of Defendant in Error and for the use of the manufacturing plant and industry of Defendant in Error because the said order and judgment of the Supreme Court are violative of Section 1 of Article XIV of the Amendments to the Consti-

tution of the United States in that the same will, if enforced herein,

(a) Take the property of Plaintiff in Error for a private purpose and use without its consent;

(b) Deprive Plaintiff in Error of its property without compensation;

(c) Take the property of Plaintiff in Error without due process of law;

(d) Deny to Plaintiff in Error the equal protection of the law.

3. In rendering judgment herein sustaining the trial court in affirming the order of the Railroad & Warehouse Commission and thereby finding and holding as a fact that said order is lawful and reasonable for the reason that:

(a) The evidence adduced before the trial court shows said order to be unreasonable and unlawful;

(b) Said evidence fails to show that said trackage is for any public use or purpose;

(c) The evidence shows that said trackage is for the private use and purpose of Defendant in Error;

(d) No public necessity for said track is shown or found.

4. In rendering judgment herein sustaining the judgment of the trial court affirming the order of the Railroad and Warehouse Commission, and thereby holding that the State of Minnesota in the exercise of the police power may compel Plaintiff in Error to construct, maintain and operate the said spur track facilities at all, or may do so and apportion the ex-

pense of the construction thereof between the Plaintiff and Defendant in Error for the reason that the judgment of said Supreme Court, if enforced herein, will deprive the Plaintiff in Error of its property without compensation and without due process of law and will be violative of section 1 of Article XIV of the Amendments to the Federal Constitution.

THE MINNESOTA STATUTES.

The Minnesota Railroad and Warehouse Commission is created and its powers fixed by Chapter 28 of the 1913 General Statutes of Minnesota (Chap. 28, Rev. L. 1905).

The so-called spur track law here in question is sections 4284 and 4231 thereof (R. L. 1905, secs. 1983 and 2006). This spur track statute (Minn. Gen. Statutes 1913, secs. 4284 and 4231) originated in chapter 65, General Laws of Minnesota for 1893; was recast by the revision of 1905 (R. L. 1905, secs. 1983 and 2006). It is as follows:

> "4284. *Side Tracks to Elevators, Mills, Etc.* Every such company, upon written demand of the owner of any grain warehouse or mill of not less than five thousand (5000) bushels capacity, adjacent to the right of way of such company and at or near any regular station thereof, shall construct, maintain and operate at its own expense, proper side tracks connecting such warehouse or mill with the tracks of such railroad and afford the owner thereof proper and reason-

able facilities for shipment therefrom. Should additional right of way be required for such side track, the cost and expense of procuring it shall be paid by the owner of said mill or warehouse. Such company shall also construct, maintain and operate side tracks connecting with its road any such grain warehouse, *dock*, *wharf*, mill, *coal yard*, quarry, brick or lime kiln, or manufactory adjacent thereto as shall be required and on such terms as may be fixed by the commission on application of either party.

"4231. Terms of Connection with Warehouses, Etc.—If the owner of any manufactory, warehouse, *dock*, *wharf*, mill, *coal yard*, stone quarry, or brick or lime kiln entitled to connection with any railroad, and the carrier operating such railroad, fail to agree upon the terms for such connection, upon petition of either party, and proper notice to the adverse party, the commission shall fix such terms by proceedings as herein provided in case of complaints to it and subject to appeal as in such cases."

The words in italics were added by chapter 376, General Laws 1913.

This statute is more crude even than its ancient vintage justifies. The more modern and well considered statutes are constructed on the theory of the Washington and Wisconsin spur track acts, considered in

State vs Commission, 77 Wash. 529, Ann. Cases 1915D 202

Union Lime Co. vs Ry. Co., 233 U. S. 211

which avoid the constitutional objections to this statute by provision that the applicant shall compensate the carrier for such actual expenses of the track as shall be fixed as reasonable, and that the track shall be subject to use by others than the applicant for whom it is originally constructed upon their payment to him of a reasonable proportion of the primary cost of construction, thus making the track subject to the public use, should such demand arise, protecting the applicant, and securing to the carrier compensation for the taking of

In *State vs C. M. & St. P. Ry. Co., 115 Minn. 51*, the Minnesota Supreme Court in construing the statute treats said section 4284 as conferring the power and section 4231 as supplemental thereto, and as committing "the question of the apportionment of the cost * * * to the sound discretion of the Commission" (p. 53).

As construed the statute provides that the carrier shall construct, maintain and operate side tracks, at its own expense, connecting any of the specified industries, including brick plants which are located adjacent to the right of way, at or near stations, with its line of road, additional right of way, if any, to be at the cost of the industry. If the parties "fail to agree upon the terms of such connection" such terms are to be fixed by the Commission.

Here the Commission is vested with power to require the carrier to furnish and operate private trackage, or trackage, whatever be its nature, without compensation, or at best places the matter of compensation in the discretion of the Commission.

ARGUMENT.

Some General Rules Applicable;

An unconstitutional grant of power can never be exercised in a constitutional manner.

> *McInnis vs Ry. Co., 109 Miss. 482, L. R. A. 1915E 682.*
>
> "The law itself must save the parties' rights and not leave them to the discretion of the courts as such."
>
> *Louisville Ry. vs Stock Yards Co., 212 U. S. 132, 144.*

That the order for construction and maintenance of this trackage, which involves an expenditure of money and the taking a part of the railway right of way, or either, amounts to a taking of the railway company's property, there can be no question.

> *Mo. P. Ry. vs Nebraska, 217 U. S. 196*
>
> *G. N. Ry. vs Minn., 238 U. S. 340*
>
> *C. M. & St. P. Ry. vs Wis., 238 U. S. 491*
>
> *Oregon & C. Ry. Co. vs Fairchild, 224 U. S. 510*
>
> *Mo. Pac. Ry. Co. vs Nebraska, 164 U. S. 403.*

Any freight revenue that may come to the railway company by reason of the construction of this track-

age, if any, must be in the way of reasonable and legal charges made to all shippers for services performed as a common carrier and not as compensation for the taking of its property.

C. & O. Ry. Co. vs Lumber Co., 174 Fed. Rep. 107.

Also the taking of property and the fixed right to compensation therefor must coincide although payment may be deferred. The right must be fixed.

C. M. & St. P. Ry. vs Wis., 238 U. S. 491
Mo. P. Ry. Co. vs Nebraska, 217 U. S. 196
Sweet vs Rechel, 159 U. S. 380.

The police power does not include the power to pass unconstitutional laws. It is subject to constitutional limitations. Property cannot be taken under that power for private use at all or for public use without compensation.

ASSIGNMENTS I, II, III AND IV.

With the foregoing undisputed rules in mind and for brevity, discussing the assignments together, we make the following points:

1. The statute and the order and judgment affirming the same, if enforced, will take the property of Plaintiff in Error for private use.

2. Passing that point, and waiving, arguendo, the character of the use, there is a taking of such property without compensation, and without due process of law.

3. The taking of such property is not justified under the police power.

4. The judgment and its enforcement denies to Plaintiff in Error the equal protection of the law.

There is practically no dispute about the facts.

The railway company's position is that while certain public duties devolve upon the common carrier by reason of the public nature of its business, and these it can be compelled to perform, regardless of whether it will be compensated therefor (*Chicago & Alton Ry. Co. vs Tranbarger*, 238 U. S. 67), the order and judgment here require an act not of that class.

The brick plant is a purely private enterprise, operated for the owner's private gain, which it may continue or not as it will. (Rec. 20, 21, 34.) In it the public has no interest and over it no control. The nature and use of the old trackage was for twenty-five years private (Rec. 34) and such will be that of the new. (Rec. 20, 21, 33.) Its location is on private premises (Rec. 43) away from a station and switching facilities (Rec. 34) and reached by no public street or highway (Rec. 55-6).

The petition makes no claim of any possible public use. (Rec. 1-3.) The evidence and findings (Rec. 5-7) exclude such claim. Public facilities must be for public use and free from discrimination in favor of any particular person to say nothing of its being for his exclusive use.

The claim that the public is in any way concerned is disposed of by the fact that the railway company

is ready to construct the trackage upon being indemnified therefor (Rec. 4, 7, 55). This private concern (Rec. 34) for its private use (Rec. 20, 21, 33) seeks to take the property of a carrier which has already furnished all stational facilities required by law and the public use, because he is not satisfied with such public facilities. The demand is that the carrier come to this industry alone, regardless of any stational facilities it now maintains. While the question of the constitutional integrity of the statute and judgment is one of law, it must be considered in connection with the findings and facts upon which the same are grounded.

The commission makes no finding beyond the necessity of the trackage "for the proper operation of complainant's plant." (Rec. 6.) There is no finding of public interest or public necessity other than the suggestion of the general interest of the public in the prosperity and distribution of the product of this plant (Rec. 6). The trial court adopts substantially the findings of the Commission (Rec. 45 7).

1. THE PLAINTIFF IN ERROR CONTENDS THAT COMPELLING IT TO BUILD THE TRACKAGE IN QUESTION UNDER THESE FACTS IN ACCORDANCE WITH THE COMMISSION'S ORDER AMOUNTS TO TAKING ITS PROPERTY FOR PRIVATE USE.

That the order as affirmed by the judgment of the Supreme Court amounts to a taking of Plaintiff's in Error property is true, as heretofore noted, from the

fact that it is compelled in part to bear the construction expense and all that of maintenance and operation and also from the fact that a part of its right of way is taken for the exclusive use of this trackage. That the land upon which the track is to be laid is to be transferred to the Railway Company or that there is a possibility so remote as to be purely speculative that the company may use the track for other purposes cannot alter the situation. There is no other use for the track. (Rec. 20, 21, 33.) The railway company could not extend the track as there is nothing to extend it to. (Rec. 20.) If the brick plant should cease operation, there would be no use for the track. (Rec. 33.) Others could not use it as it is surrounded by the brick company's premises. (Rec. 34, 43.) There is no circumstance in the case but which indicates the private character of the track and the order and judgment results clearly in taking the railway company's property for a private use, and the rule that the state has no power to exercise the right of eminent domain, the police power or the power of taxation for private purposes and unless the exercise of the power has for its objects the furtherance of it, it cannot be sustained, is applicable here.

We note the following menu of well considered authorities illustrative of the application of this rule:

Mo. P. Ry. vs Nebraska, 164 U. S. 403 416. (1896)

N. P. Ry. Co. vs Commission, 58 Wash. 360, 28 L. R. A. (N. S.) 1021 (1910)

Commission vs Ry. Co., 35 Tex. Civ. App. 52, 80 S. W. Rep. 102 (1904)

Mays vs Ry. Co., 75 S. C. 455, 56 S. E. Rep. 30 (1906)

State vs Ry. Co., 36 Minn. 402.

An analysis of some of these cases follows:

In *Mo. Pac. Ry. Co. vs Nebraska, 164 U. S. 403, 416*, certain farm owners and grain growers, pursuant to a state statute, construed to require a carrier which had permitted erection of grain elevators by private persons on its right-of-way at stations to grant like rights to other private persons in which to store grain, demanded a location accordingly which the company was ordered to furnish by the State Transportation Board. Mandamus was awarded to compel obedience to this order and on writ to this Court it was

Held, That the order involved the taking of private property for private use.

The court say:

> "The order in question was not, and was not claimed to be, either in the opinion of the court below, or in the argument for the defendant in error in this court, a taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals, voluntarily associated together for their own benefit. They do not appear to have

been incorporated by the State for any public purpose whatever; or to have themselves intended to establish an elevator for the use of the public. On the contrary, their own application to the railroad company, as recited in their complaint to the board of transportation, was only 'for a location, on the right of way at Elmwood station aforesaid, for the erection of an elevator of sufficient capacity to store from time to time the cereal products of the farms and leaseholds of complaints aforesaid, as well as the products of other neighboring farms.'

"To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specified purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railroad company, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for public a use, to an association of private individuals, for the purpose of erecting and maintaining a building thereon for storing grain for their own benefit, without reserving any control of the use of such land, or of the building to be erected thereon, to the railroad company for the accommodation of its own business, or for the convenience of the public.

"This court confining itself to what is neces-

sary for the decision of the case before it, is unanimously of opinion, that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a State of the private property of one person or corporation, without the owner's consent, for the private use of another, is due not process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

In *N. P. Ry. Co. vs R. R. Commission, 58 Wash. 350, 28 L. R. A. (N. S.) 1021*, the facts were:

"The appellant owns and operates a line of railroad extending from Tacoma easterly and southeasterly through the state, and southerly through Rainier and McIntosh to the Columbia river. Rainier and McIntosh are stations about four miles apart. Mr. Burnham owns and operates a sawmill about midway between the stations, and about 300 feet from the appellant's main-line track. He manufactures about six carloads per week of lumber and other sawed timbers, for shipment over appellant's lines of road, and hauls it by means of wagons and teams to Rainier, a distance of about 2½ miles by wagon road at an expense of about $40 a car-

load for hauling and loading. With a spur track to his mill, he could put his products aboard the car for about $5 per carload. He has demanded of the appellant that it furnish him with a spur track to the mill, has offered to furnish a right of way for the track, grade the track, and furnish and lay the ties under the direction of the appellant; but it has refused to comply with his demand. Upon a complaint alleging these facts, and also alleging that a spur track can be constructed at small expense to the appellant, extending from the main line of its road to the mill, without endangering or rendering difficult the operation of trains, the case was heard before the railroad commission. The commission found the facts stated, and that a necessity exists for the spur track. Thereafter it entered an order requiring Burnham to construct the grade and furnish proper and necessary ties, and requiring appellant to furnish and lay the rails, construct the spur track, provide proper connections with its main line, and furnish Burnham with cars and facilities for loading his lumber at his mill for shipment over the appellant's lines."

Held, upon the authority of

Mo. P. Ry. Co. vs Nebraska, 164 U. S. 403;
Mo. P. Ry. Co. vs Nebraska, 217 U. S. 196;
State vs Ry. Co., 36 *Minn.* 392;

"That the attempt by the state to compel a

railroad company to construct and operate a spur track to a private mill is void, as a taking of property for private use without due process of law."

In the *Union Lime Co. case, 233 U. S. 211*, holding that industry tracks, under certain conditions, are public, the track required was declared by the statute in question, as construed by the Wisconsin court, to be for such public use as authorizes condemnation of right of way therefor under the laws of Wisconsin. The public character of the track was produced by virtue of the conditions, fixed by the statute, under which its construction could be required, making it at all times a part of the carrier's transportation system, operated as such and subject to public authority and under such authority available for use by any one when his interest or the public interest and convenience required such use. Trackage constructed and operated under such conditions, with compensation secured so as to protect the carrier against demands for expensive gratuities and subject by the statute to such control as to protect at all times, both the carrier and the public is distinguished from the mere private siding here in question which is required to be constructed, maintained and operated, subject to no such safeguards of the carrier's property or the public interests.

In the *Union Lime Co. Case* this court say:

"While common carriers may not be compelled to make unreasonable outlays (Missouri Pacific

Ry. Co. v. Nebraska, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carrier's lines, thus furnished under the direction of authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow. The Supreme Court of Wisconsin has left no doubt with respect to the public obligations imposed upon the carrier in relation to the spurs and branches to be provided under the statute in question, and we find no ground for the conclusion that this enactment was beyond the state power."

Here no conditions are imposed; no public necessity is shown; no present or future possible use or necessity is apparent, other than that of the private plant. The wholesome and reasonable condition, that the industry must, at least in the first instance, bear the expense of the track is not present here, and no check is interposed against unreasonable demands for private trackage at the carrier's expense easily made and stipulated by the holding here in question, except the discretion of the administrative body.

2. THE STATUTE AND JUDGMENT, IF ENFORCED, WILL TAKE THE RAILWAY COMPANY'S PROPERTY WITHOUT COMPENSATION AND WITHOUT DUE PROCESS OF LAW.

This is true upon the authority of this court and as a matter of principle upon the facts of the case at bar.

Between those so-called public duties, which a railway company is held bound to perform by reason of the public nature of its business, regardless of whether it will be compensated therefor, and those acts which are not properly classed as such public duties, no court has undertaken to mark out the exact borderline. Carriers are subject to regulation. Their invested property is private property and is under the protection of the fundamental guaranties of the Constitution and cannot be taken without compensation or without due process of law. One of these truisms must not destroy the other. A railway company must comply with regulations although involving expenditure of money requiring it "to keep its roadbed and right of way clear from combustible matters, to provide its locomotive engines with spark arresters, to fence its tracks, to provide cattle guards and gates at crossings or bridges or viaducts or the like" (Chicago & Alton Ry. Co. vs Tranbarger, 238 U. S. 77). These are public duties and uncompensated enforcement thereof does not take property without compensation or without due process, but beyond the scope of these duties the carrier

cannot be required to go uncompensated. The tracks here are not required under such conditions about public use and control, fixed by law, as to make them a part of the public utility and as such always available for public use by the carrier in the discharge of its so-called "public duties."

In discussing this point the court in the case of *Oregon R. R. N. & Co. vs Fairchild*, 224 U. S. 510, 529, say:

> "The question in each case must be determined in the light of all the facts, and with a just regard to the advantage to to be derived by the public and the expense to be incurred by the carrier. For while the question of expense must always be considered (Chicago &c. R. R. v. Tompkins, 176 U. S. 167, 174), the weight to be given that fact depends somewhat on the character of the facilities sought. If the order involves the use of property needed in the discharge of those duties which the carrier is bound to perform, then, upon proof of the necessity, the order will be granted, even though 'the furnishing of such necessary facilities may occasion an incidental pecuniary loss.' But even then the matter of expense is 'an important criteria to be taken into view in determining the reasonableness of the order.' Atlantic Coast Line R. R. v. North Carolina Commission, 206 U. S. 1, 27; Missouri Pacific Ry. v. Kansas, 216 U. S. 262. Where, however, the proceeding is brought

to compel a carrier to furnish a facility not included within its absolute duties, the question of expense is of more controlling importance. In determining the reasonableness of such an order the court must consider all the facts,—the places and persons interested, the volume of business to be affected, the saving of time and expense to the shipper, as against the cost and loss to the carrier."

In the case of *Missouri Pacific Ry. Co. vs Kansas*, 216 U. S. 262 (279), the court say:

"The fact that the performance of the duty commanded by the order which is here in question may, as we have conceded for the purpose of the argument, entail a pecuniary loss, is, of course, as declared in the *Atlantic Coast Line case* as a general rule, a circumstance to be considered in determining its reasonableness, as are the other criteria indicated in the opinion in that case. But where a duty which a corporation is obliged to render is a necessary consequence of the acceptance and continued enjoyment of its corporate rights, those rights not having been surrendered by the corporation, other considerations are in the nature of things paramount, since it cannot be said that an order compelling the performance of such duty at a pecuniary loss is unreasonable. To conclude to the contrary would be but to declare that a corporate charter was purely unilateral, that is, was bind-

ing in favor of the corporation as to all rights conferred upon it and was devoid of obligations as to duties imposed, even although such duties were the absolute correlative of the rights conferred. Was the duty which the order here commanded one which the corporation was under the absolute obligation to perform as the result of the acceptance of the charter to operate the road, is then the question to be considered."

In *Northern Pacific Ry. Co. vs North Dakota*, 236 U. S. 585, the court say:

"The general principles to be applied are not open to controversy. The railroad property is private property devoted to a public use. As a corporation, the owner is subject to the obligations of its charter. As the holder of special franchises, it is subject to the conditions upon which they were granted. Aside from specific requirements of this sort, the common carrier must discharge the obligations which inhere in the nature of its business. It must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are properly called public duties, and the State within the limits of its jurisdiction may enforce them. The State may prescribe rules to insure fair remuneration and to prevent extortion, to secure substantial equality of treatment in like

cases, and to promote safety, good order and convenience.

"But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed."

And in *Missouri Pacific Ry. vs Nebraska, 217 U. S. 196 (206)*:

"Now it is true that railroads can be required to fulfill the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262. It also is true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the police power. But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under

> either the police power or any other ostensible justification for taking such property away."

In the light of this distinction between public duties of carriers and those acts which cannot be so classed and the facts in this case, the case of *Missouri Pacific Railway Company vs Nebraska, 217 U. S. 196*, is controlling in favor of the Railway Company's position.

The state statute in question considered in that case is found on pages 204 5 of the report.

Under this act the grain company applied for an elevator site, which was refused. It then built and demanded a siding thereto, which being refused, sued for penalties. The defense challenged the validity of the statute. This court held it void because *it does not provide indemnity for what it requires.* The facts which are more favorable to the demand made than those in the case at bar, are set out by the Nebraska court (81 Neb. 15) as follows:

> "The building of a side track upon the defendant's right of way is not a taking of its property. The switch or side track will be owned by defendant and under its control. It remains a part of defendant's railroad, and a part of the public highways of the state. The Grain Company will have no exclusive use of the side track. As said in C. B. & Q. R. Co. vs Giffen, 70 Neb. 66, 'The proprietor of an elevator built upon the right of way of a railroad company by permission of the company, is a licensee upon the

premises, and must operate his elevator, loading cars therefrom, subject to the right of the company to handle its trains and use the track for switching purposes, in the ordinary and usual way of doing such work.' While the elevator in the case at bar is built upon the grounds owned or controlled by a grain association adjacent to the defendant's right of way, this will not at all change the rule relating to the use of the side track. The Company may still use the track for its own purposes, and will be under no further obligation to the grain company than to furnish cars for the transaction of its business, giving it equal facilities with other like companies upon said switch, or upon its right of way.

* * * * * *

"Not only is this the case, but the business of the railroad itself would be greatly facilitated by the building of this sidetrack. Now the grain has to be hauled from the elevator to the cars in wagons, and but two cars a day can be loaded. With proper side-track facilities the same work can be done in from one to two hours—a saving of time and expense to the shippers—thus clearing the railway track of cars that would otherwise necessarily incumber it for some days. The expense of extending the sidetrack, as shown by the defendant's own evidence, will not exceed $450.00 while the revenue derived from

the shipment of grain will, as otherwise shown, amount to, or exceed, $3000.00 per annum."

In the *Nebraska case* five points were urged and considered:

1. What may be required of a Railroad Company under the police power without compensation.

2. Whether the ultimate return to a carrier from increased business could be held compensation for the taking of property under the due process rule.

3. The question of power to compel the Railway Company to construct and maintain side tracks without compensation for its outlay in so doing.

4. The general nature of the statute and its failure to fix a distinction between reasonable and unreasonable demands for trackage.

5. Want of provisions for hearing in advance as to requirements in any case.

It was discussed and determined:

(a) That railroad companies may be compelled to fulfill the obligation incident to their public duty, and do what is reasonably necessary to serve the public in the way in which they undertake to serve it, under the police power.

(b) That requiring the expenditure of money takes property and that any ultimate return from increased business cannot be considered compensation for such taking.

The act was held unconstitutional:

(c) *Because it provided no indemnity for what it required, and upon this point alone the decision is based.*

(d) Because, being general in terms, it made no distinction between reasonable and unreasonable demands.

(e) Because it made no provision whatever for a hearing in advance as to the requirements in any particular case.

There can be no mistake about what this decision holds. In discussing these questions the court said (italics ours):

> "It will have been noticed that there is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required. In the present cases, the initial cost is said to be $450 in one and $1732 in the other: and to require the company to incur this expense unquestionably does take its property, *whatever may be the speculations as to the ultimate return for the outlay.* Woodward v. Central Vermont Railway Co., 180 Massachusetts, 599, 602, 603. Moreover a part of the company's roadbed is appropriated *mainly to a special use, even if it be supposed that the side track would be available incidentally for other things than to run cars to and from the elevator.*
>
> "But if the statute is to be stretched, or rather shrunk, to such demands as ultimately may be held reasonable by the state court, still it requires too much. *Why should the railroads*

pay, for what, after all, are private connections? We see no reason." (P. 207.)

Here it is considered and assumed that the side track in question "would be available incidentally for other things than to run cars to and from the elevator." (P. 206.) In other words, for such public use as would enable the company to condemn right of way therefor under the rule of the *Union Lime Co. case* (233 U. S. 211). And the court was careful (perhaps in view of a later amendment to the statute being considered) to limit the decision as an authority by expressly stating, for that purpose, at the close of the opinion what it did not decide, as follows:

> "We are of opinion that this statute is unconstitutional in its application to the present cases, *because it does not provide indemnity for what it requires. We leave other questions on one side*, and do not intend by anything that we have said to prejudice a later amendment providing for a preliminary hearing *and compensation*, which is said to have been passed in 1907." (P. 208.)

Accordingly, the other constitutional questions (d) and (e) are put, in the last part of the syllabus, under the head of "*Quaere*" indicating that the case turned on a decision of point (c), and is authority upon that point only.

We submit that the rule of this court is under this authority clear that the building of spur trackage to a private industry is not one of those public duties

which a Railway Company may be properly compelled to perform without compensation and that the enhanced value of the property and possible future freight receipts by reason of the track do not constitute such compensation as was considered by the Minnesota Supreme Court in *State vs C. M. & St. P. Ry. Co., 115 Minn. 51 (53-4), Ochs vs C. & N. W. Ry. Co., 135 Minn. 323 (325-6) (Rec. 54-7)* and *Sand, Lime & Brick Co. vs Great Northern Ry., 137 Minn. 314.*

This is the view of this court again expressed in *Northern Pacific Railway Co. vs North Dakota, 236 U. S. 585*, where the *Nebraska case* was discussed. This court said:

> "Similarly, in *Missouri Pacific Ry. v. Nebraska, 217 U. S. 196*, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because *the obligation was not involved in the carrier's public duty* and the requirement went beyond the reasonable exercise of the State's protective power."

The *Nebraska case* seems to be accepted as having settled the rule in these spur track cases where it has not already been fixed by statute like that of Wisconsin, considered by this court in *Union Lime Co. case, 233 U. S. 211.*

Nor. Pac. Ry. Co. vs R. R. Com. of Washing-

ton, 58 Wash. 360, 28 L. R. A. (N. S.) 1021

St. Louis & S. F. R. Co. vs State, 27 Okla. 424

McInnis vs N. O. & N. E. Ry. Co., 100 Miss. 482, L. R. A. 1915E 682

A. T. & S. F. R. Co. vs State, 27 Okla. 616.

That case is followed and the principle applied by the Washington Court in *N. P. Ry. Co. vs Commission, 58 Wash. 360, 28 L. R. A. (NS) 1021,* (1910).

In *St. Louis &c. Ry. Co. vs State, 27 Okla. 424,* (1910) the Nebraska case is again reviewed and applied. The case involved the review of an order of the Commission compelling Railway Company to furnish trackage to an elevator company situated on the right of way. The order was based upon a finding that the complainant was discriminated against in not being granted the same privileges on the right of way adjoining the switch track as were granted to other elevators already located thereon and the purpose of the order was to place the parties upon the same footing. The order required the Railway Company to bear all expense except the complainant was to pay for the cross ties and grading. The court say:

> "The Supreme Court of the United States, in Mo. Pac. Ry. Co. v. State of Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, has passed upon the power of the state of Nebraska to compel a railroad company to put in switches at its own expense on the application of owners

of elevators erected within a specified limit under a statute which by its terms required them to do so. In that case it was held: 'It is beyond the police power of a state to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It amounts to deprivation of property without due process of law; and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections.'"

The rule of the *Nebraska case* is considered and applied by the Mississippi Court in *McInnis vs Ry. Co., 57 L. R. A. (NS) 682* (1915) with annotation. In this case the Commission's order required the applicant to secure the right of way, do the grading and furnish all materials, the Railway Company to construct and maintain the track. The court held, citing and basing its holding upon the authority of the *Nebraska case* (217 U. S. 196):

> "A railroad company cannot, in view of the constitutional provision against taking property without due process of law, be compelled to construct and maintain spurs or sidings to connect industrial plants with its right of way, even upon the sole conditions that they will not cause hazard to the property and trains of the company, and the cost of materials and right of way is imposed upon the applicant."

The reason of the court is put in this language:

"We think that statutes of this character are condemned as unconstitutional by the Supreme Court of the United States in Missouri P. R. Co. v. Nebraska, 217 U. S. 196. * * *

"Our statute puts it in the power of a Commission to require railroad companies to spend money for the purpose of giving special facilities to certain named industries without requiring any indemnity for the money expended, and without regard to the circumstances, if, in the opinion of the Commission, the property or trains of the railroad will not be endangered thereby. No matter what may be the special circumstances or necessities of the case, the Railroad Commission is given the power to order the construction of a side track to any or all industrial plants. What the Commission may or may not do in each case is immaterial, inasmuch as their statutory power is unlimited except as above noted. It may be that the Commission will, as suggested, consider each application for a spur track upon its merits, and with due regard for the public welfare, but such are not the requirements of the statute. The statute is the thing to be considered, and it is under the authority of the statute the Commission may take the property of railroads without requiring due compensation, and *this statutory power is just what the Supreme Court of the United*

States has declared to be in contravention of the Constitution of the United States. An unconstitutional grant of power cannot be exercised in a constitutional manner." (Italics ours.)

The findings of fact of the Commission (Rec. 5–8) are substantially adopted by the trial court (Rec. 45–47) and upon these findings the judgment of the Supreme Court is based (Rec. 54–7). There is no finding of public necessity. The suggestion that the public is interested in the development of this industry may be made of any private business. There is no showing that the trackage can or will in any way serve any public use or convenience.

If the mere and ordinary interest of the public in the distribution of the products of this private plant imposes upon the carrier the "public duty" to favor it with extraordinary shipping facilities, such as tracks for its own use, whenever necessary in the discretion of an administrative officer or body, then the point that the property of railroads is protected by the Constitution is point no point and there are no "constitutional limits of what can be required of their owners under the police power or any other ostensible justification for taking such property away."

And we submit that for this reason the order compelling the company to bear the expense of the tracks for which no public necessity is shown, takes its property without due process of law even though it

was given a hearing on the question, cannot be denied.

In *Washington ex rel Oregon R. & N. Co. vs Fairchild, 224 U. S. 510*, the court say:

> "The Commission's order requiring the Oregon Company to make track connection was not a mere administrative regulation, but it was a taking of property, since it compelled the defendant to expend money and prevented it from using for other purposes, the land on which the tracks were to be laid. Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet. For the guaranty of the Constitution extends to the protection of fundamental rights, to the substance of the order as well as to the notice and hearing which precede it. 'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.'
>
> * * * * * * * * *
>
> "If, then, the defendant had notice and was given the right to show that the order asked for,

if granted, would be unreasonable, it has not in this case been deprived of the right to a hearing. That being so, it leaves for consideration the contention that as a matter of law, the order, on the facts proved, was so unreasonable as to amount to a taking of property without due process of law. This necessitates an examination of the evidence, not for the purpose of passing on conflicts in the testimony or of deciding upon pure questions of fact, but, as said in Kansas City Railway Co. v. Albers Commission Co., 223 U. S. 573, 591, from an inspection of the 'entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter.' Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655; Graham v. Gill, 223 U. S. 643. Here the question presented is whether as matter of law the facts proved show the existence of such a public necessity as authorizes a taking of property."

3. THE ORDER AND JUDGMENT CANNOT BE JUSTIFIED AS AN EXERCISE OF THE POLICE POWER.

If upon the facts involved the order and judgment result in an unwarranted attempt to take property without compensation under the exercise of the police power, the order should be held unlawful. This

is simply another route leading to the same conclusion.

Great Northern Ry. Co. vs Minnesota, 238 U. S. 340

Mo. Pac. Ry. Co. vs Nebraska, 217 U. S. 196

St. Louis Ry. Co. vs State, 27 Okla. 424

N. P. Ry. Co. vs Commission, 58 Wash. 360, 28 L. R. A. (NS) 1021.

In *Great Northern Ry. Co. vs Minnesota*, 238 U. S. 340, the court say:

> "The applicable principles were announced in Oregon Railroad &c. Co. v. Fairchild, 224 U. S. 510, 524. A taking of railroad property under administrative regulation must 'be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet.' The facts being established the question then presented is whether as matter of law they are adequate to support a finding of requisite public necessity—the mere declaration of a commission is not conclusive."

The police power was invoked and relied upon by the Attorney General in the *Nebraska case*, 217 U. S. 196. (See brief of Defendant in Error, p. 203.) The point is covered and decided in that case *where the character of the use of the track in question was con-*

sidered a public one. The court say (p. 206) (italics ours):

> "Now it is true that railroads can be required to fulfill the purposes for which they are chartered and to do what is reasonably necessary to serve the public in the way in which they undertake to serve it, without compensation for the performance of some part of their duties that does not pay. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262. It also is true that the States have power to modify and cut down property rights to a certain limited extent without compensation, for public purposes, as a necessary incident of government—the power commonly called the *police power.* But railroads after all are property protected by the Constitution, and there are constitutional limits to what can be required of their owners under *either the police power or any other ostensible justification for taking such property away.*"

Here it is expressly ruled, where the right under the police power was urged and relied upon, that the carrier cannot be compelled to construct trackage for an industry, under that power without compensation; that property cannot be taken for public purposes without compensation.

In *St. Louis Ry. Co. vs State, 27 Okla. 424,* the same claim and argument was made, and the decision was against it. The court say (italics ours):

> "The Supreme Court of the United States, in

Mo. Pac. Ry. Co. v. State of Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727, has passed upon the power of the state of Nebraska to compel a railroad company to put in switches at its own expense on the application of owners of elevators erected within a specified limit under a statute which by its terms required them to do so. In that case it was held: "*It is beyond the police power of a state to compel a railroad company to put in switches at its own expense on the application of the owners of any elevator erected within a specified limit. It amounts to deprivation of property without due process of law:* and so held as to the applications for such switches made by elevator companies in these cases under the statute of Nebraska requiring such switch connections."

In *N. P. Ry. Co. vs Commission*, 58 *Wash.* 360, 28 *L. R. A.* (*NS*) 1021 (1910) the order for trackage to a sawmill, was sought to be sustained under the *police power*. The court say (p. 1024):

"The contention of the attorney general that the order is promotive of the public convenience, *and within the recognized police power of the state, cannot be upheld.* We are persuaded, upon both principle and authority, that the Burnham mill is a private business, and that an order requiring the railroad company to extend a switch or spur track beyond its right of way, to afford him better and cheaper shipping facilities, is, in

substance and effect, requiring the company to devote its property to the private use of another, and is within the protective clause of the Federal Constitution."

4. THE STATUTE AND JUDGMENT DENY PLAINTIFF IN ERROR THE EQUAL PROTECTION OF THE LAW.

That a railway company may be required by law or proper order to discharge duties which the public nature of its business imposes upon it is true and such requirements impose no unlawful burden. We, however, here, contend as we have above argued, that the law and judgment seek to compel the railway company at its own expense to perform an act which does not fall within the range of its public duties as a common carrier. If we are correct, then the railway company here is denied the equal protection of the law, because as to all matters in which its duties to the public are not involved it stands in no different position than any other person. The police power is subject to constitutional limitations.

Great Northern Ry. Co. vs Minnesota, 238 U. S. 340

C. M. & St. P. Ry. Co. vs Wisconsin, 238 U. S. 491.

Minnesota Cases: The Minnesota court in this case and two others now to be noted does not consider, as we read the opinions, that the construction, maintenance and operation of the tracks in question fall within the range of the public duties of the Plaintiff

in Error and for that reason that the same may be required without compensation, but holds that possible enhancement in value of its property and the probable increase in revenue which may be caused by the trackage amounts to compensation within the constitutional requirements, and that, there being no question about opportunity for hearing under the Minnesota statute, as there was in the *Nebraska case*, the holding is in accord with the rule of this court in that case. This is the view of the Commission (Rec. 6) and the trial court (Rec. 49). The case of *State vs C. M. & St. P. Ry. Co., 115 Minn. 51*, was relied upon below by Defendant in Error. The *Nebraska case* was considered by the court below in that case, and, as we think, properly construed as holding that the trackage could not be required without compensation, but distinguished because of an admission and record waiver of its claim for indemnity by the railway company, because it contended, not that its property was taken without compensation, but only that the Commission by its order did not make an equitable apportionment of the cost of the track. The court stated the admission and waiver as follows:

> "Upon the hearing of the petition by the commission the appellant conceded * * * * that the petitioner was and is entitled to a side track, and that the railway company desired it as much as he for a business consideration; and,

> further, that in regard to the commercial side of the proposition the company would concede anything that was claimed, but that it refused to build the side track and switch, because it deemed that they would unreasonably increase the danger in operating its trains in and out of Mendota at the point where the side track would connect with its main line." (Op. p. 52)

And in distinguishing that case from the Nebraska case the court say (italics ours):

> "The admission of record by the appellant to the effect that the petitioner is entitled to a side track, that it desired the side track for business considerations, and that it would be commercially profitable to it, *is a conclusive answer to appellant's claim that the order deprives it of its property without due process of law. This distinguishes this case from the case of Missouri Pacific Ry. Co. v. State of Nebraska*, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. Ed. 727."

Two decisions have been made by the Minnesota court since the *Milwaukee case* (115 Minn. 51), one of them in this case *Ocks vs C. & N. W. Ry. Co., 135 Minn. 323*, (Rec. 54 7) and the other in *Range Sand Lime & Brick Co. vs Great Northern Ry., 137 Minn. 314*, both based upon the doctrine of the *Milwaukee case* (115 Minn. 51).

In this case the court below considers that the statute in the *Nebraska case* was condemned solely

because it provided no opportunity for hearing, and that the Minnesota statute does not have that infirmity (135 Minn. 323, Rec. 54–7). We respectfully submit, as we have argued, the holding of the *Nebraska case* was that the trackage could not be required without compensation, and that possible increase of value of property or of revenue, if any, because of the trackage is not compensation.

CONCLUSION.

The spur track statute in question as construed and applied by the court vests the commission with power to require, as it has done, construction and maintenance of the trackage for private use or for public use without compensation where there is no showing or finding of such public necessity as should stimulate the police power so as to justify thereunder the taking without compensation, and for the reasons urged the judgment should be reversed.

The case of *State vs C. M. & St. P. Ry. Co., 113 Minn. 51* (Rec. 54–7) was considered as controlling this case by the Commission and both courts below. We respectfully submit that it is not in accord with the rule of this court as applied in the *Nebraska case*. The Minnesota Supreme Court say, in considering the case, with reference to the questions here presented:

> "The final solution of such problems rests with the Supreme Court of the United States,

and we shall unhesitatingly apply the rule which that court shall establish."

Ochs vs C. & N. W. Ry. Co., 135 Minn. 326 (Rec. 56).

Respectfully submitted,

L. L. Brown,
W. D. Abbott,
S. H. Somsen.
Attorneys for Plaintiff in Error.

March, 1918.

-20-

SUPREME COURT

OF THE

United States

OCTOBER TERM, 1916

NO. 159.

Chicago & North Western Railway Company,
Plaintiff in Error,

vs.

A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MINNESOTA.

Reply Brief for Plaintiff in Error

RICHARD L. KENNEDY,
Attorney for Plaintiff in Error.

SUPREME COURT
OF THE
United States

OCTOBER TERM, 1916

NO. 159.

Chicago & North Western Railway Company,
Plaintiff in Error,

vs.

A. C. Ochs, doing business under the name of A. C. Ochs Brick & Tile Company,
Defendant in Error.

REPLY BRIEF FOR APPELLANT IN ERROR.

Before replying to the brief of the defendant in error, the appellant in error deems it proper to call the attention of the court to the fact that since the rendition of the judgment herein by the Supreme Court of Minnesota on January 12, 1917, the entire railroad of the plaintiff in error has been taken over by the Federal Government, pursuant to a proclamation of the President of the United States of December 26, 1917, and an Act of Congress approved March 21, 1918. Since December 28, 1917, the entire railroad of the plaintiff in error has been, and now is, under the exclusive control and management of, and operated by, the United States Railroad Administration under the direct supervision of William G. McAdoo

as Director General of Railroads. Since said date the appellant in error has had and now has no power or right to enter upon the right of way, or to construct, maintain or operate the industry track, involved in this proceeding.

It should further be observed that pursuant to authority conferred by said proclamation and act of Congress, the Director General of Railroads has issued two orders with reference to construction of industry tracks, viz.: General Order No. 15, issued March 26, 1918, and Supplement No. 1 to General Order No. 15, issued December 5, 1918, copies of both of which are appended to this brief for convenient reference.

The effect of the fact of Federal control, and the effect of the orders of the Director General with reference to the construction, maintenance and operation of industry tracks, such as the track involved in this case, should be considered in the determination of this matter. It is submitted that, as a result thereof, it is beyond the power of the appellant in error to comply with the judgment of the Supreme Court of Minnesota herein involved.

The appellant in error also desires to answer two contentions of the defendant in error, viz.:

I. The claim that the industry track under consideration in this case is public and not private; and,

II. The claim that under the police power of the State the construction, maintenance and operation of the industry track involved herein may be required.

I.

With reference to the contention of the defendant in error that the industry track involved in this proceeding is not a private industry track, the attention of this court is directed to the following considerations, which, it is respectfully submitted, establish its character as a private industry track.

1. Minnesota Statutes 1913, Section 4284, (Appellant's Brief, p. 7) which is the corner stone upon which this entire proceeding rests, should be particularly noted in considering the question as to whether or not the track involved in this proceeding is a private track, as this statute provides that a railroad company upon written demand shall construct, maintain and operate, "at its own expense," proper side tracks, connecting the adjacent industries specified, with the tracks of such railroads "*and afford the owner thereof* proper and reasonable facilities for *shipment therefrom.*" It is respectfully submitted that from the express terms of this statute it conclusively appears that the purpose of the statute was to compel the construction of private industry tracks only, and that the statute was not designed to, and does not, embrace side tracks other than private industry tracks.

2. That the side track in question is a private industry track further appears from the complaint filed by the defendant in error with the Railroad and Warehouse Commission of the State

of Minnesota, which initiated this proceeding. (Folios 4, 5.) In paragraph 3 of this complaint it is alleged, as the reason the spur track is demanded, that the erection of the new plant "will require about twenty carloads of firebrick, which will have to be shipped in over respondent's road, and unloaded at said new plant at a point where there is at present no side track; that a large amount of machinery will likewise be shipped in and unloaded for use in said new buildings, requiring the side track facilities herein prayed for" * * * "that as soon as said new plant is completed, the complainant will start the manufacture of brick and tile therein and same will be burned in said ten new kilns, which will be constructed at a point where there are no side track facilities, and that in order to load the same into railway cars economically and in a practical way, it will be necessary to have a new side track alongside of said new kilns, also for the unloading of coal to be burned therein." So in paragraph 7 of the complaint (Folio 5) it is alleged "that complainant needs at the present time, and will in the near future have still greater need of a new side track * * * to be used in unloading the twenty carloads of firebrick to be used in constructing the remaining eight new kilns, also the machinery for the new plant and the coal to be used in the kilns when in operation, and to load the products of said new plant into railway cars."

It is submitted that there is nothing in the complaint—the foundation of this proceeding—even

suggesting that the spur track is other than a private industry track.

3. The order of the Railroad and Warehouse Commission of Minnesota likewise establishes that the spur track under consideration is a private industry track, as appears from the transcript. (Folio 12.) The Commission there says, "besides the product 'out,' there will be shipments of coal and lumber 'in' and from thirty to forty cars of firebrick to be used to complete the plant." The Commission also says (Folio 12), "there was no dispute that this trackage was necessary for the proper operation of *complainant's plant*, the only question presented being upon what terms it should be constructed." It is evident that the Commission regarded the spur track as one for the exclusive use of the Brick Company. The order clearly requires the construction of an industry track, for a private concern, for its private use, regardless of ample stational facilities, and requires the railroad to contribute thereto a portion of its right of way, a portion of the expense of construction, and the entire expense of maintenance and operation.

4. From the testimony at the hearing upon appeal in the District Court, it likewise appears that the track in question is not a public track but a private industry track.

It appears (Folios 19, 51) that the brick plant is located less than one-half mile from the local railroad yard of the C. & N. W. Railway Company at Springfield, Minnesota; that (Folio 52) Spring-

field has sufficient stational facilities, including yards, side tracks, industry tracks and team tracks; that (Folios 5, 25, 31, 47 and 50) the Brick Company owns all the land upon which the proposed side track is to be constructed, except the part thereof which is on railroad right of way; that (Folio 84) there is no highway by which the public can gain access to the track; that (Folio 19) the A. C. Oehs Brick & Tile Company is a purely private enterprise operated for private gain; that (Folios 50, 52, 53), aside from serving the Oehs Brick & Tile Plant, there is no other purpose whatever for which the proposed track could be used; that (Folios 50, 53) if this industry were taken away, the spur track under consideration would, undoubtedly, be taken up; that (Folio 64) others could not use it as it is surrounded by the Brick Company's premises. Conversely the owner of the brick plant testified (Folio 31) that he wanted the spur track for the use of his kilns; that there is no other industry located, or to be located, on this track, and that this track is to be an exclusive track for A. C. Oehs & Company.

5. In the findings and order of the trial judge it was found (Folio 68) "*that in order to operate said new plant properly and to advantage*, it is necessary to re-arrange the side tracks, and to build what amounts to a new side track to said plant." It is true that the trial court in his memorandum (Folio 71) says

> "That the furnishing of side tracks to industries at or near railway stations when reasonably necessary, is a public matter, and the taking of private property for such purpose is a taking for public use, is well settled in this state. And it is so held by the Supreme Court of the United States in the *Union Lime Co.*, case in 233 U. S. 211."

This, however, is his conclusion as to the law merely, and does not affect his finding as to the facts.

6. While the Supreme Court of Minnesota concludes, *as a matter of law*, that (Folio 83) "property taken for such purposes is taken for a public use, *Union Lime Company vs. C. & N. W. Ry. Co.,* 233 U. S. 211; *State vs. C. M. & St. P. Ry. Co.,* 115 Minn. 51, and cases cited therein," it should be noted that this conclusion of law is based upon the facts hereinabove summarized, and with this should be considered the fact that this entire proceeding is based upon Section 4284 of the General Statutes of Minnesota, 1913, which, by its terms, provides merely for the construction of private industry tracks.

It is submitted that the statute—the basis of this proceeding—is unconstitutional, in that, by its terms it provides for the taking of property for private purposes.

It should likewise be noted that, while in the brief of the defendant in error (pp. 4 to 10; 14 and 15), the decisions of the Minnesota Supreme Court construing the statutes involved are reviewed, it appears therefrom that the Supreme

Court of Minnesota has not construed the Minnesota statute as one providing for public facilities. In this connection the attention of the court is directed to the fact that it has been repeatedly held by this court that "the law itself must save parties' rights and not leave them to the discretion of the courts as such." *Louisville & Nashville R. R. Co. vs. Central Stock Yards Co.*, 212 U. S. 132, citing *Security Trust & Safety Vault Co. vs. Lexington*, 203 U. S. 323; *Roller vs. Holly*, 176 U. S. 398, 409; *Connecticut River R. R. Co. vs. County Commissioners*, 127 Mass. 50, 57; *Ash vs. Cummings*, 50 N. H. 591; *Moody vs. Jacksonville, Tampa & Key West R. R. Co.*, 20 Fla. 597; *Ex Parte Martin* 13 Arkansas 198; *St. Louis vs. Hill*, 166 Missouri 527.

This court is not foreclosed by the finding of the Minnesota Supreme Court in this case to the effect that the industry track involved is for public use, but may by reference to the statute upon which this proceeding is based, and from the transcript, determine for itself whether or not the track is a private industry track. *Hairston vs. Railway*, 208 U. S. 598, at 607; *Oregon R. R. and N. Co. vs. Fairchild*, 224 U. S., at 528; *Union Lime Co. vs. C. & N. W. Ry. Co.*, 233 U. S., at 218, 219; *G. N. Ry. vs. Minnesota*, 238 U. S. 340, at 345.

It is therefore confidently submitted that a review of the transcript, in connection with the statute upon which the proceeding is based, together with the considerations presented in the original brief of the plaintiff in error, must result in the

conclusion that the spur track involved in this proceeding is purely and simply a private industry track, and that since the property of the plaintiff in error cannot be taken for private use, the judgment of the Supreme Court of Minnesota herein cannot be sustained.

II.

With reference to the contention of the defendant in error that under the police power of the State the construction, maintenance and operation of the spur track involved herein may be required, the plaintiff in error directs the attention of the court again to the fact that (Folios 19, 51) the brick plant of the defendant in error is located less than one-half mile from the local railroad yard of the C. & N. W. Railway Company at Springfield, Minnesota; that (Folio 52) Springfield has sufficient stational facilities, including yards, side tracks, industry tracks and team tracks; that (Folios 50, 52, 53) aside from serving the Ochs Brick & Tile plant there is no other purpose whatever for which the proposed track could be used; that (Folios 50, 53) if this industry were taken away, the spur track under consideration would undoubtedly be taken up, as there would be no use for it.

While it is conceded that certain public duties may be required of common carriers, without compensation, it is submitted that the construction, maintenance and operation of the track involved in this proceeding is not such a duty.

The exact extent of such public duties is sometimes a difficult matter to determine, but it is submitted, in view of the decision of this court in the case of *Missouri Pacific Railway Co. vs. Nebraska*, 217 U. S. 196, that such public duty does not exist in this case, and, therefore, that the property of

the plaintiff in error cannot be taken without compensation.

It is unnecessary to add to what has been said regarding this decision in the original brief of the plaintiff in error, but in view of the attempt by the Supreme Court of Minnesota to distinguish this case from its decision in *State vs. C. M. & St. P. Ry. Co.*, 115 Minn. 51, it is interesting to note that this court, in *Northern Pacific Ry. Co. vs. State of North Dakota*, 236 U. S. 585, at page 596 says:

> "Similarly in *Missouri Pacific Ry Co. vs. Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the State's protective power."

It is also interesting, in view of the attempt by the Supreme Court of Minnesota to distinguish the Nebraska case from its decisions in *Ochs vs. C. & N. W. Ry. Co.*, 135 Minn. 323, and *Range Sand-Lime Brick Co. vs. Great Northern Ry. Co.*, 137 Minn. 314, to note the language of this court in its decision in the Nebraska case, wherein it is said, "an earlier statute authorizing the State Board of Transportation, after hearing, to require the railroad to permit the erection of an elevator upon its roadbed already has been held bad. *Missouri Pacific Ry. Co. vs. Nebraska*, 164 U. S. 403. See also *Hartford Fire Ins. Co. vs. Chicago*,

Milwaukee & St. Paul Ry. Co., 175 U. S. 91, 99." So in *Washington vs. Fairchild*, 224 U. S. 510, 523, this court in speaking of an order of the State Commission says, "Its validity could not be sustained merely because of the fact that the carrier had been given an opportunity to be heard, but was to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet."

The decision in the case of *Union Lime Co. vs. Chicago & North Western Ry. Co.*, 233 U. S. 211, upon which the defendant in error relies, is clearly distinguishable from this court's decision in the Nebraska case, and from the case at bar, since the Wisconsin statute, upon which the proceeding in that case was based, expressly provided (pp. 217-219) that the railway should be compensated for the expense involved in the construction of the track, and also expressly provided for the use thereof by the public.

In view of the foregoing, and the considerations presented in the original brief of the plaintiff in error, it is clear that the judgment of the Supreme Court of Minnesota herein cannot be sustained.

Respectfully submitted,

RICHARD L. KENNEDY,
Attorney for Plaintiff in Error.

UNITED STATES RAILROAD ADMINISTRATION.

General Order No. 15.

Washington, March 26, 1918.

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(a) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company.

(b) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point.

(c) Generally speaking, an industry shall pay for and maintain (although in special cases the railroad company may do so), and the railroad company shall own, that part of the track on the right of way from the clearance point to the right of way line.

(d) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition.

(e) The railroad company shall have the right to use the track when not to the detriment of the industry.

(f) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention

of the regional director, who will report thereon to the Director General, if conditions seem to warrant.

4. The requirements of State statutes and of State Commissions in respect of the construction, maintenance and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the regional director, who will report thereon to the Director General, if the conditions seem to warrant.

W. G. McAdoo,
Director General of Railroads.

UNITED STATES RAILROAD ADMINISTRATION.

Supplement No. 1 to General Order No. 15.

Washington, December 5, 1918.

General Order No. 15, dated March 26th, 1918, is hereby supplemented as follows:

1. General Order No. 15 is not to be construed as requiring or authorizing a Federal Manager to enter into a contract on behalf of the Director General to pay for that part of an industry track on the right of way from the switch point to the clearance point where, in the judgment of the Federal Manager, the amount of traffic to be derived by the United States Railroad Administration from the construction of the industry track is not sufficient to justify such expenditure. In cases where, in the judgment of the Federal Manager, the circumstances justify the construction of an industry track, but the amount of revenue to be derived therefrom by the United States Railroad Administration does not justify the payment by the Director General of the cost of that part of the track on the right of way from the switch point to the clearance point, an agreement may be made, otherwise in accordance with General Order No. 15, but providing for the payment of the entire cost of the track by the shipper with a provision for refund up to, but not exceeding, the cost of the part of the track from the switch point to the clearance point, at the rate of two dollars ($2.00) per car of carload freight yielding road haul revenue, delivered on or shipped from the track during Federal control.

2. Track material contained in that portion of an industry track on the railroad right of way which was installed and paid for by the industry during Federal control shall remain the property of the industry, except to the extent that refund of the cost thereof shall have been made by the

railroad or the Director General, but such ownership shall be subject to the right of the railroad to use the track when not to the detriment of the industry.

3. Upon the discontinuance of use of an industry track for the purposes of the industry, the industry shall have the right to have the track material on the right of way which was paid for by the industry during Federal control taken up and delivered to the industry, except to the extent that the cost of such track material shall have been refunded to the industry by the railroad or the Director General. The work of taking up the tracks shall be done, if the Federal Manager shall so desire, by the forces of the Federal Manager, but in any event at the expense of the industry.

W. G. McAdoo,
Director General of Railroads.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 159.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

A. C. OCHS, doing business under the name of A. C. OCHS BRICK & TILE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

CLIFFORD L. HILTON,
Attorney General,

HENRY C. FLANNERY,
Asst. Attorney General,
St. Paul, Minnesota,

AUGUST G. ERICKSON,
Springfield, Minnesota,
Attorneys for Defendant in Error.

SUBJECT INDEX.

LIST OF CASES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM.

No. 159.

CHICAGO & NORTHWESTERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

A. C. OCHS, doing business under the name of A. C. OCHS BRICK & TILE COMPANY,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ADDITIONAL STATEMENT OF CASE.

The Defendant in Error's brick plant is located about half a mile from the depot in Springfield (Rec. 52). The business was started twenty-nine years ago and has con-

tinually grown and has been shipping from 200 to 350 cars a year. During the year 1914 its shipments were 245 cars of its products "out," and 53 cars of coal and lumber "in," on which the freight charges were $10,116.83. Besides brick, Defendant in Error, manufactures drain tile and material for silos and has an extensive patronage over Plaintiff in Error's line of road and its connections in Minnesota, North and South Dakota, Iowa and Illinois. (Rec. 11.)

Because of increasing business it has been found necessary to increase his manufacturing facilities. (Rec. 11.) In the fall of 1914, Defendant in Error began the construction of an additional plant adjacent to the old plant. (Rec. 82.) The new plant will cost $150,000.00. When completed it will be as perfect a plant for the business in which it is engaged as there is in the United States. It will have a capacity of from 75 to 80 carloads of manufactured material per day, for shipment. Practically all of the product is shipped over Plaintiff in Error's line, there being no other railroad reaching Springfield. (Rec. 11-12, 82.)

The old brick plant was provided with separate terminal facilities. These tracks were put in at various times by the Plaintiff in Error, and the respondent did the grading. (Rec. 46.) That the terminal facilities at the plant would be inadequate when the new plant was built was conceded. (Rec. 4, 8, 12, 68, 84.) No claim was made that the sidetrack at the village depot would help out the situation.

It has been the custom of the Plaintiff in Error, and other railroads in Minnesota, to grant sidetrack privileges to industries like this and bear a part of the expense. (Rec. 13.)

Defendant in Error first took up the matter of additional terminal facilities at its plant with the Plaintiff in Error. One of its engineers was sent to the plant, where he set out stakes for the track. The stakes extended, in part, over land which did not belong to Defendant in Error. (Rec. 45.) Defendant in Error then purchased the additional right of way upon which the stakes were set, for $210. (Rec. 27.) There was no dispute as to the proper location of the trackage to accommodate both the old and new plant. As the Commission said: "The survey for the same was made by the Commission's engineer, together with the engineer of the Respondent and Complainant, and the location agreed upon." (Rec. 12.)

Of the total cost of $2,298.71, the Defendant in Error was required to pay for the grading, grubbing and other work, amounting in all to $747.50. He was also required to convey the entire right of way to the Plaintiff in Error, including the small portion which had just been purchased for $210. (Rec. 13-15.)

ARGUMENT.

The Minnesota Statutes and Their Construction By the Minnesota Supreme Court.

The statutes whose constitutionality is attacked in these proceedings are sections 4284 and 4231, Minnesota General Statutes, 1913. They are as follows:

> "Every such company, upon written demand of the owner of any grain warehouse or mill of not less than five thousand (5,000) bushels capacity, adjacent to the right of way of such company and at or near any regular station thereof, shall construct, maintain and operate at its own expense, proper sidetracks, connecting such warehouse or mill with the tracks of such railroad, and afford the owner thereof proper and reasonable facilities for shipment therefrom. Should additional right of way be required for such sidetrack, the cost and expense of procuring it shall be paid by the owner of said mill or warehouse. Such company shall also construct, maintain and operate sidetracks connecting with its road any such grain warehouse, dock, wharf, mill, coal yard, quarry, brick or lime kiln, sand or gravel pit, crushed rock or concrete plant, or manufactory adjacent thereto as shall be required and on such terms as may be fixed by the Commission on application of either party."
>
> 4231. "If the owner of any manufactory, warehouse, dock, wharf, mill, coal yard, stone quarry, or brick or lime kiln entitled to connection with any railroad, and the carrier operating such railroad, fail to agree upon the terms for such connection, upon petition of either party and proper notice to the adverse party, the Commission shall fix such terms by proceedings as herein provided in case of complaints to it and subject to appeal as in such cases."

The Statutes governing the proceedings, where complaint is filed with the Commission, are Sections 4179-4184, 4191, 4192 and 4200. They are as follows:

4179. "Proceedings before the Commission against any such carrier or public warehouseman shall be instituted by complaint, verified as a pleading in a civil action, stating in ordinary language the facts constituting the alleged omission or offense. The parties to such proceeding shall be termed, respectively, 'complainant" and 'respondent.' "

4180. "Upon filing such complaint, if there appear reasonable grounds for investigating such matter, the Commission shall issue an order directed to such carrier or warehouseman, requiring him to grant the relief demanded or show cause by answer within twenty days from the service of such notice why such relief should not be granted. Such order, together with a copy of the complaint, shall forthwith be served upon the respondent."

4181. "The respondent may file and serve by mail upon the complainant, within twenty days after the service of the order, an answer alleging that it has already granted the relief demanded, or setting up any matter of defense. If the answer allege the granting of the relief, the complainant shall within twenty days reply, admitting or denying such allegation. If he fails to reply, or admits the allegation, the proceeding shall be dismissed."

4182. "If the matter is not adjusted to the satisfaction of the Commission, it shall set a time and place of hearing, and give at least ten days' notice thereof to each party. The parties may appear either in person or by attorney. The Commission shall hear evidence, and otherwise investigate the matter, and shall make findings of fact upon all matters involved, and such order or recommendation in the premises as may be just. A copy of such findings and order or recommendation shall forthwith be served upon each party. No proceeding shall be dismissed on account of want of pecuniary interest in the complaint. In all proceedings excepting where the reasonableness of rates are under consideration, hearings may be had before one Commissioner, who shall decide the matter in controversy and make a report of his decision to the Commission. Upon the approval of such report, it shall become the decision of the Commission."

4183. "All notices and orders in proceedings before the Commission shall be signed by the secretary. Service may be made of all notices, orders, and other papers provided for in this chapter by mail upon any person or firm, or upon the president, general manager, or other proper executive officers of any corporation interested. If any party has appeared by attorney, such service shall be made upon such attorney."

4184. "The Commission in any hearing or investigation may require the attendance of witnesses and the production of any books, papers and records. Witnesses shall receive the same fees and mileage as in civil actions. Disobedience of any subpoena in such proceeding, or contumacy of a witness, may, upon application of the Commission, be punished by any district court in the same manner as if the proceeding were pending in such court."

4191. "Any party to a proceeding before the Commission, or any party affected by any order thereof, or the state of Minnesota, by the attorney general, may appeal therefrom to the district court of the county in which the complainants, or a majority of them, reside, or in case none of them reside in the state, or in a proceeding commenced by the Commission on its own motion without complaint, to the district court of one of the counties in which the order of the Commission requires a service to be performed, or an act to be done or not to be done by the carrier or warehouseman; or in case of train service, to the district court of one of the counties through which the train runs, at any time within thirty days after service of a copy of such order on the parties of record, as in this chapter provided, by service of a written notice of appeal on said Commission, or on its secretary. Upon service of said notice of appeal, said Commission, by its secretary, shall forthwith file, with the clerk of said district court to which said appeal is taken, a certified copy of the order appealed from, together with findings of fact on which the same is based in case appeals are taken to the district court of more than one county, they shall be consolidated

and tried in the district court of the county to which the first appeal was taken."

4192. "The person serving such notice of appeal shall, within five days after the service thereof, file the same with proof of service, with the clerk of the court to which such appeal is taken; and thereupon said district court shall have jurisdiction over said appeal, and the same shall be entered upon the records of said district court and shall be tried therein according to the rules relating to the trial of civil actions, so far as the same are applicable. The complainant before the Commission, if there was one (otherwise the state of Minnesota), shall be designated as complainant in the district court, and the carrier or warehouseman as defendant. No further pleadings than those filed before the Commission shall be necessary. Such findings of fact shall be prima facie evidence of the matters therein stated, and the order shall be prima facie reasonable, and the burden of proof upon all issues raised by the appeal shall be on the appellant. If said court shall determine that the order appealed from is lawful and reasonable, it shall be affirmed and the order enforced as provided by law. If it shall be determined that the order is unlawful or unreasonable it shall be vacated and set aside. Such appeal shall not stay or supersede the order appealed from unless the court, upon an examination of said order, and the return made on said appeal, and after giving the respondent notice and opportunity to be heard, shall so direct. If such appeal is not taken, such order shall become final, and it shall thereupon be the duty of the carriers affected to adopt and publish the rates or classifications therein prescribed. And all orders heretofore made, from which no appeal is taken, as provided by law, shall be deemed to have been in full effect for all purposes from the time when the right to appeal from such order expired. When no appeal is taken from an order, as herein provided, the parties affected by such order shall be deemed to have waived the right to have the merits of such controversy reviewed by a court, and there shall be no trial of the merits, or re-examination of the facts of any controversy in which such order

was made, by any district court to which application may be made for a writ to enforce the same."

4200. "Any party to an appeal or other proceeding in district court under the provisions of this chapter, may appeal from the final judgment, or from any final order therein, in the same cases and manner as in civil actions. No bond shall be required from the Commission, and no such appeal shall stay the operation of such order or judgment unless the district or supreme court shall so direct, and unless the carrier appealing from a judgment or order fixing rates for transportation of persons or property shall give bond in a sum and with sureties approved by a judge of the court ordering the stay, conditioned that the appellant will refund to the person entitled thereto any amount received for such transportation above the amount finally fixed by the court. Any person paying such excessive charges, shall have a claim for the excess, whether paid under protest or not, and, unless refunded within thirty days after written demand made after final judgment, may recover the same by action against such carrier, or such carrier and the sureties on such bond. The appeal may be filed in the supreme court before or during any term thereof, and shall be immediately entered on the calendar and heard upon such notice as the court may prescribe."

The portion of said section 4284 relating to brick kilns, requires the railway company to construct and operate only such sidetrack as are required and on terms fixed by the Commission. It is necessary that such brick kilns be adjacent to the railway tracks and the brick company is required to pay the cost of any additional right of way required. In case of disagreement upon the terms for such connection, the Commission is authorized by section 4231, to fix them.

In construing this law the Supreme Court of Minnesota said, in the case of State v. Chicago, Milwaukee & St. Paul Ry. Co., 115 Minn. 51:

> "This statute must receive a liberal construction, and one which will not render it unconstitutional. It is sufficient for the purposes of this case to say that the statute does not require railroads to construct and operate sidetracks to industries when it cannot be done without extraordinary hazards to person and property, or, in other words, when it would necessarily affect in an unreasonable degree the safe operation of trains on the main line."

In this case the Minnesota Supreme Court said:

> "Under our law the company cannot be required to construct a sidetrack until the Commission, after a full hearing and a consideration of all the circumstances, has determined that its construction is necessary, and that the part of the expenditure therefor, apportioned to the company is reasonable."

In the case of Range Sand-Lime Brick Co. v. Great Northern Railway Co., 137 Minn. 314, it was said:

> "Complaint is made that the public necessity was not found. It was not found specifically, but it was necessarily implied in the Order of the Commission, affirmed by the court."

Plaintiff in Error states on page 9 of its brief that—"*As construed* the statute provides that the carrier shall construct, maintain and operate sidetracks, *at its own expense*, connecting *any* of the specified industries, including brick plants which are located adjacent to the right of way, at or near stations with its line of road, additional right of way, if any, to be at the cost of the industry." (Italics ours.)

Much of its argument is based upon this assumption; yet it is apparent that the law in question, as construed by the Supreme Court of Minnesota, only requires the construction of such sidetracks as the Commission finds to be

necessary and only places such burden of cost upon the railway company as the Commission finds reasonable.

Plaintiff in Error states on page 20 of its brief:

> "No check is interposed against unreasonable demands for private trackage at the carrier's expense easily made and stipulated by the holding here in question, except the discretion of the administrative body."

As the state court construes the law there are ample checks in that the track must be found by the Commission to be necessary, the expense must be reasonably apportioned, and, as the court further said:

> "If dissatisfied with the determination made by the Commission, the company may have the entire matter reviewed by the courts."

THE CONSTITUTIONALITY OF STATE STATUTES SHOULD BE CONSIDERED IN THE LIGHT OF THE CONSTRUCTION PLACED UPON THEM BY THE STATE COURT OF LAST RESORT.

> "The construction so given to the statute by the highest court of the state must be accepted by this court in judging whether the statute conforms to the constitution of the United States. Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 456; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 152."
>
> Missouri Pac. Ry. Co. v. Nebraska, 164 U. S. 403, 414.
>
> Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211.

THE FACTS SHOW THAT THE TRACK IS PUBLIC AND NOT PRIVATE.

Plaintiff in Error's first contention is that compelling it to build the trackage in question in accordance with the Commission's order amounts to a taking of its property for private use.

In support of its contention it lays stress upon the fact that the industry, primarily to be served, is a private one and therefore claims that the trackage will also be private. This conclusion is, we believe, unwarranted. Before the sidetrack is laid the right of way is required to be conveyed to the railway company. The track is then its own property and just as much a part of its railway system as any other portion of its line. Its operation is subject to the supervision of the State Commission. In case it is desired to abandon the same, application must first be made to the Commission, a hearing held and a satisfactory showing made that such abandonment will not result in substantial injury to the public. (Section 4424, General Statutes of Minnesota, 1913.)

> "Any such company desiring to abandon or close for traffic any portion of its line, siding, sidetrack, spur or other railway track, shall first make application to the Commission in writing. Before passing upon such application, the Commission shall fix a time and place for hearing and require such notice thereof to be given as it deems reasonable. Upon the hearing, the Commission shall ascertain the facts and make findings thereon, and if such facts satisfy the Commission that the proposed abandonment or closing for traffic will not result in substantial injury to the public, they may allow the same, otherwise, it shall be denied, or, if the facts warrant it, the application may be granted in a modified form."

The record discloses the fact that the old track was used to some extent, at least, to accommodate the business of farmers and the railway company. (Rec. 30-31, 49-51.) Plaintiff in Error's witness, Boyle, testified that the track could be used for storing cars. (Rec. 53.) Questions as to whether Defendant in Error made any claim to the exclusive use of the track, and as to whether the track could be used by the Plaintiff in Error for any purpose other than serving the brick plant, were excluded, upon the objection of Plaintiff in Error. So also were questions as to whether it would be feasible and practicable for farmers to use the track. So also were offers to prove that existing natural conditions made it possible for other industries to spring up, which could be served by this track, or an extension of it. (Rec. 61-63.)

THE SUPREME COURT OF MINNESOTA HAS HELD THE SIDE-TRACK IN THIS AND OTHER SIMILAR CASES TO BE PUBLIC AND NOT PRIVATE.

In this case it was said in the opinion:

> "At the outset the company lays down the unquestioned proposition that its property cannot be taken for private use, and asserts that requiring it to construct this trackage takes its property for private use. The order requires the right of way to be conveyed to the railway company, and the right of way, together with the tracks thereon, will be the property of the railway company and become a part of its railway trackage to be operated as a part of its railway system. Property taken for such purposes is taken for a public use. Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 34 Sup. Ct. 522, 58 L. ed. 924; State v. Chicago, M. & St. P. Ry. Co., 115 Minn. 51, 131 N. W. 859, and cases cited therein."

"The company seems to contend that even if the construction of a sidetrack to an industry adjacent to its right of way be an appropriation of property to a public use, yet the changes in the tracks and the additions thereto here in question are not for a public use but for complainant's private benefit. Where the owner makes such an addition to his plant that additional trackage is necessary, we are unable to make any distinction in principle between the duty to furnish a sidetrack to the original plant and the duty to furnish it to the new plant. The new or additional plant can stand in no worse position because constructed by the owner of the old plant, than if constructed by some one not connected therewith. The company also argues that the proposed tracks can serve only a private purpose, for the reason that they will be surrounded by private property, and there is no highway by which the public can gain access to them. Whenever such highway is necessary, it can be provided." (Rec. 83-84.)

In a similar case, decided by the same court in 1917, it was said:

"The defendant contends that it is a taking for private use. We conclude that the use is public. The spur will not be merely a private siding. It will be a part of the defendant's railroad system and additional trackage for public use. The defendant gets title to the right of way. It is at the service of such of the public as wish its use. By its use the general public gets the products of the plaintiff's plant and there is a demand for them along the defendant's line. The defendant must continue its operation and through it serve the public. The defendant could have condemned for the spur and this upon the theory that the use to be made of it was public. Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 311; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527. That the proposed use is public was held in very similar situations in Ochs v. Chicago & N. W. Ry. Co., 135 Minn. 323, and State v. Chicago, M. & St. P. Ry. Co., 115 Minn. 448."

Range Sand-Lime Brick Co. v. Great Northern Ry. Co., 137 Minn. 314.

In a similar case, decided by the same court in 1911, it was said:

> "The next contention is that the appellant, in order to construct the sidetrack, would be obliged to cross a public highway; but it could not acquire a right to construct and operate the track over the highway by the exercise of the power of eminent domain, because it would not be taking property for public use. The highway in question is upon the land of petitioner, and it will only be necessary for the appellant to exercise the right of eminent domain in case it fails to secure an agreement from the proper authorities as to the terms and conditions upon which it may cross the highway. R. L. 1905, sec. 2916. * * * The appellant could not exercise the power of eminent domain for any use except a public use. Upon consideration of the whole record, we are of the opinion, and so hold, that the taking of land upon which to lay and operate the sidetrack from appellant's main line to the quarry would be for a public use under the decisions of this court. Kettle River R. Co. v. Eastern R. Co. of Minn., 41 Minn. 461; Chicago, B. & N. R. Co. v. Porter, 43 Minn. 527; Stewart v. Great Northern Ry. Co., 65 Minn. 515; State v. Willmar & S. F. Ry. Co., 88 Minn. 448."
>
> State v. Chicago, M. & St. P. Ry. Co., 115 Minn. 51.

THE DECISION OF THE HIGHEST COURT OF THE STATE, ON THE QUESTION OF WHETHER THE USE IS PUBLIC OR PRIVATE, HAS UNIFORMLY BEEN SUSTAINED BY THIS COURT.

A similar objection was made in the case of Union Lime Company v. Chicago & N. W. Ry. Co., 233 U. S. 211. In disposing of that point, this court said:

> "It is said, in the first place, that the statute does not declare in terms or by necessary implication, that the use for which the property is to be taken is a pub-

lic use. But this contention is plainly without merit, as the statute must be read in the light of the construction placed upon it by the state court, which has held the described use to be a public one. The judgment of the state, so far as it is competent to determine the matter has thus been fully expressed."

In the case of Hairston v. Danville & W. R. Co., 208 U. S. 598, it was said:

"No case is recalled where the court has condemned as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In Missouri P. R. Co. v. Nebraska, ubi supra, it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people."

This court has also said:

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the court of last resort of the state passing the act, has often been declared. While the ultimate authority to determine the validity of legislation under the Fourteenth Amendment is vested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect."

Jones v. City of Portland, 245 U. S. 217.

THE SAME ELEMENTS HAVE BEEN CONSIDERED AND THE USE HELD TO BE PUBLIC BY OTHER COURTS.

Plaintiff in Error states on page 12 of its brief that: "The petition makes no claim of any possible public use. (Rec. 1-3.) The evidence and findings (Rec. 5-7) exclude such claim. Public facilities must be for public use and free from discrimination in favor of any particular person to say nothing of its being for his exclusive use."

The Union Lime Company case is important on this phase of the instant case because it shows what elements have been considered by this court as making the use a public one. It was said in the opinion:

> "It is urged further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be constructed to furnish an outlet for the products of a particular plant; its cost may be defrayed by those in special need of its services at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority."

In the Hairston case, supra, this court said:

> "The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry or because the proprietors of that industry contributed in any way to the cost."

In the case of Bedford Quarries Co. v. Chicago, I. & L. R. Co., 175 Ind. 295, it was said:

> "The running of a sidetrack by a railroad company to a private manufacturing establishment to connect the business of such establishment with the main line of the railroad is a public use for which land may be appropriated."

It was also said:

> "The right of the public to use such tracks makes the use thereof public. Such tracks seem a proper mode of making the facilities of the railroad available and open to all who are so situated as to be able to use them upon equal terms, and there is no sound reason why they should not be regarded as a public use."

And further:

> "The character of the use of a railroad or railroad track does not depend on the amount of business done or the number of persons who may have occasion to use it, but on the right of the public to have the benefit of it. If all the people have the right to use it, it is a public interest, although the number who require its use may be small."

A large number of other cases were cited to the same effect.

In the case of Ulmer v. Lime Rock R. R. Co., 98 Me. 579, it was said:

> "But the mere fact that the primary purpose of such a branch is to accommodate a particular private enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact it is not material that but few persons will enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken, it may in fact be used only for the business of the plant to which it is

> constructed, because at that time no other business enterprise may exist in that vicinity to furnish freight for transportation, but in the future other industries may spring up, either upon the line or upon the extension thereof, so that a branch track which in the first instance is primarily constructed for the accommodation of one, may become of equal accommodation, benefit and use to others."

See also the case of State ex rel. C. M. & St. P. R. Co. v. Pub. Ser. Com., 77 Wash. 529, and the case of Railroad Com. v. Louisville & N. R. Co., 96 S. E. (Ga.) 855.

THE MINNESOTA SIDETRACK LAW AND THE ORDER OF THE COMMISSION SHOULD BE SUSTAINED AS A VALID EXERCISE OF THE POLICE POWER.

Plaintiff in Error also contends that the Minnesota sidetrack law and the order of the Commission cannot be justified as an exercise of the police power.

Upon that point the Minnesota Supreme Court said, in its opinion:

> "The principal contention of the company, however, is that it cannot be compelled to bear any part of the expense of constructing the proposed sidetrack without infringing the constitutional inhibitation against taking private property for public use without compensation. The question is whether the state under its police power may require the company to provide such sidetrack facilities, to industries adjacent to its tracks as shall be found to be necessary and reasonable under all the circumstances, and may apportion the necessary expense therefor between the company and the industry in such manner as shall be found to be reasonable, without compensation to the company other than the enhancement in the value of its property which will follow from the sidetrack becoming a part of such property and from the addi-

tional business brought to the company. That the additional business brought to the company will be of substantial amount in this case appears from the fact that complainant paid the company $10,000.00 in freight charges during the year preceding the initiation of these proceedings and that the addition to the plant will more than double its output. The necessity for the sidetracks, if complainant is to operate its plant successfully, is not questioned; and, if the expense therefor may be apportioned between the industry and the railroad, the reasonableness of the apportionment is not questioned. The position of the company is that it cannot be required to bear any part of such expense."

"The company relies largely upon the decision of the United States Supreme Court in Missouri Pac. Ry. Co. v. Nebraska, 217 U. S. 196, 30 Sup. Ct. 461, 54 L. ed. 727, 18 Ann. Cas. 989. The statute under consideration in that case required the railroad company to construct sidetracks at its own expense, when application was made therefor, without any opportunity whatever for a hearing as to the necessity or reasonableness of the proposed expenditure. Under our law the company cannot be required to construct a sidetrack until the Commission, after a full hearing and a consideration of all the circumstances, has determined that its construction is necessary, and that the part of the expenditure therefor apportioned to the company is reasonable. If dissatisfied with the determination made by the Commission, the company may have the entire matter reviewed by the courts. We think there is a wide difference between the question involved here and those involved in the case cited.

* * * The final solution of such problems rests with the Supreme Court of the United States, and we shall unhesitatingly apply the rule which that court shall establish, but we do not understand that that court has held that a state, in the exercise of its police power, may not require a railroad to provide necessary sidetrack facilities to an industry adjacent to its tracks upon such terms as shall be found to be reasonable under all the circumstances and after a full hearing, although such terms may impose a part of the expense therefor upon the railroad. See Union Lime

Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, 34 Sup. Ct. 522, 58 L. ed. 924."

The Supreme Court of Minnesota has sustained the constitutionality of the law in question and the order of the Commission upon the theory that it was a valid exercise of the police power.

If its decision upon that question is correct, then enforcement of the judgment will not constitute a taking of property without compensation, or without due process of law, within the meaning of the 14th Amendment to the Constitution.

The enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the 14th Amendment.

Chicago & Alton Ry. Co. v. Tranbarger, 238 U. S. 67.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 275.

New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 462.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 591.

In the case of Louisville Ry. v. Stockyards Co., 212 U. S. 132, Mr. Justice McKenna said:

> "The exigencies of this case do not require me to distinguish between those sovereign powers of the state denominated the power of eminent domain and the police power. Both may be exercised over private property. By the exercise of the first power property is taken, and compensation for it is a necessary condition, by the exercise of the second power property is subjected to regulation and a provision for compensation is not necessary. When regulation is transcended and becomes a taking of property may, at times, become a close question; but the power of regulation must not be overlooked or underestimated. It is, as

> I have said, an exercise of the police power, and that is the most absolute of the sovereign powers of the state."

The question of whether the law in question, the order of the Minnesota Commission and the judgment of the Minnesota Supreme Court can be sustained, as a valid exercise of the police power, becomes the most important one in this case. What are the precise limits of that power? No one can say, for this court has purposely refrained from fixing them.

It has, however, often said that the police power embraces regulations designed to promote the public convenience or the general welfare and property, as well as those in the interest of the public health, morals or safety.

> Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67.
>
> Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285.
>
> Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592.
>
> Bacon v. Walker, 204 U. S. 311, 317.

In specific cases it has sustained, as legitimate exercise of that power, regulations requiring the construction of track connections, (Jacobson v. Wisconsin M. & P. R. Co., 179 U. S. 287) bridges, (C. B. & Q. v. Illinois, 200 U. S. 561) depots, (Minneapolis & St. L. R. Co. v. Minnesota, 193 U. S. 53) and various other structures, all requiring the expenditure of money by the railway company. Clearly, then, the mere fact that the regulation requires such expenditure is not sufficient in itself to render it an unlawful exercise of the police power. That, however, is the only reason urged by Plaintiff in Error, except its contention that the track will be private and not public.

If the principles stated in the Union Lime Co. case are to be followed, and if the decision of the state court that the sidetrack is for public use is to be sustained, there does not appear to be any substantial difference between the instant case and the case of Jacobson v. Wisconsin M. & Pac. R. Co., 71 Minn. 519, affirmed 179 U. S. 287.

In that case, Chapter 10, Minnesota Laws 1887, as amended by Chapter 91, Laws 1895, provided:

> "Sec. 3. (A) That all common carriers subject to the provisions of this Act shall provide at all points of connection; crossing or intersection at grade where it is practicable and necessary for the interest of traffic, ample facilities by track connections for transferring any cars used in the regular business of their respective lines of road from their lines or tracks to those of any other common carrier whose lines or track may connect with, cross or intersect their own, * * * and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad and Warehouse Commission and either party shall have the right to appeal from the order of said Commission, fixing the amount so to be paid to the district court * * *."

The act further provided that, on the application of any person interested, the state Railroad and Warehouse Commission shall order connections to be made at such crossings.

Upon application of an individual and after a hearing, the Commission ordered a connection to be made at a crossing, the connection necessitated the installation of a curved switch 778.6 feet long. One of the companies affected by the order appealed to the district court and then to the Supreme Court and then went to the Supreme Court of the United States on a writ of error. It was claimed

that the judgment, if enforced, would result in taking the property of the Plaintiff in Error without due process of law and in refusing it the equal protection of the laws, in that the enforcement of the judgment would compel it to pay its share of the construction of a track, which would deprive it of a part of its traffic.

It was said in the opinion:

> "Taking the facts which we have already enumerated into consideration, we think there is no justification furnished for the argument that the judgment, if enforced, would violate any of the constitutional rights of the Plaintiff in Error. * * * The reasonableness of the judgment with reference to the facts concerning each case must be a material, if not a controlling factor upon the question of its validity. A statute or a regulation provided for therein, is frequently valid, or the reverse, according as the fact may be, whether it is a reasonable or an unreasonable exercise of legislative power over the subject matter involved. And in many cases questions of degree are the controlling ones by which to determine the validity, or the reverse of legislative action."
>
> "We think this case is a reasonable exercise of the power of regulation, in favor of the interests and for the accommodation of the public; and that it does not, regard being had to the facts, unduly, unfairly, or improperly affect the pecuniary rights or interests of the Plaintiff in Error. * * *."
>
> "Although to carry out the judgment may require the exercise by the Plaintiff in Error of the power of eminent domain, and will also result in some, comparatively speaking, small expense, yet neither fact furnishes an answer to the application of Defendant in Error."

In the case of Washington ex rel. O. R. & N. Co. v. Fairchild, 224 U. S. 510, it was said:

> "Since the decision in Jacobson v. Wisconsin, M. & P. R. Co., 179 U. S. 287, there can be no doubt of the power of a state, acting through an administrative

> body, to require railroad companies to make track connection. But manifestly that does not mean that a commission may compel them to build branch lines so as to connect roads lying at a distance from each other, nor does it mean that they may be required to make connections at every point where their tracks come together in city, town and country, regardless of the amount of business to be done, or the number of persons who may utilize the connection if built. The question in each case must be determined in the light of all the facts, and with a just regard to the advantages to be derived by the public and the expense to be incurred by the carrier."

The order of the state Commission in that case was a sweeping one and required connections to be made at ten separate points.

As stated in the opinion:

> "It was testified, however, without contradiction, that there was no necessity for connection at Waverly, Thornton, Farmington or Colfax."

And further:

> "Here there is no evidence of inadequate service, no proof of public complaint or of a public demand, and no testimony that any freight had been offered in the past for shipment between the points named, or that any such freight would be offered in the future; nor was there any evidence whatever as to the volume of freight that would use these tracks, or that the saving in freight and time to the shipper would justify the admitted expense to the carrier, * * *."
>
> "There is nothing by which to compare the advantage to the public with the expense to the defendant, and nothing to show that, within the meaning of the law, there is such public necessity to justify an order taking property from the company. The judgment is, therefore, reversed without prejudice to the power of the Commission to institute new proceedings."

In the instant case the proof was ample. The old plant furnished freight which yielded Plaintiff in Error in excess of $10,000 a year in freight charges. The new plant will more than double its receipts. Practically all of the product is shipped over Plaintiff in Error's line to customers in several different states. There will also be a large amount of material shipped in from various points. The necessity for the trackage was admitted. Its location was agreed upon. Plaintiff in Error is willing to build it and only objects to being required to bear a part of the expense. The $1,551.21, which it will cost the Plaintiff in Error, will all be spent upon its own property. In addition to that Defendant in Error will spend $747.50 upon Plaintiff in Error's property and will convey to it the entire right of way. The value of the right of way was not proved, except as to the small part that was purchased for $210. As was pointed out by the court, the value of Plaintiff in Error's property will be enhanced by those expenditures and by the large amount of new business available.

A case much like the one under consideration is that of Corporation Commission v. Railroad, 140 N. C. 239. In that case a sidetrack was ordered to be constructed to the mill of a lumber company. The order was made because of the authority vested in the Corporation Commission by the legislature "to require the construction of sidetracks by any railroad company to industries already established, or to be established, provided it is shown that the proportion of such revenue accruing to such sidetrack is sufficient within five years to pay the expenses of its construction." It was said in the opinion:

> "There is, in view of the great industrial development of the State, scarcely any power granted to the

Commission that is of greater importance. Owing to the exigencies of their business as well as the greater cost of land immediately at railroad stations and in towns, many factories, and especially most lumber plants, are usually situated at some distance from any passenger and freight station, though ordinarily on the line of some railroad. To require their products, which are usually shipped in carload lots, to be hauled to a distant station, often over bad roads, when the trains, perhaps, pass within a few yards of the plant, would entail a great and useless expense to the great discouragement of such enterprises in our midst. To avoid this, the railroads, whenever the receipts, in their judgment, will justify it, have for years been putting in such sidings, upon which empty cars are placed when called for, and when loaded are taken away by some passing train." * * *

"Prior to the enactment of this provision of the statute, the establishment rested in the arbitrary will of the common carrier, who could also discontinue such sidings at will. Such power, it will be seen, placed the industrial development of the State at the mercy of the railroad management, which could mar the prosperity of any plant along its line by refusing a siding, or arbitrarily discontinuing it, if established."

See also the case of State ex rel. Mt. Hope Coal Co. v. White Oak Ry. Co., 65 W. Va. 15.

Plaintiff in Error relies mainly upon the decision in the case of Missouri Pacific Ry. Co. v. Nebraska, 217 U. S. 196. In that case the court had under consideration a track which it considered to be private. The track was said to be a "reduplication of already physically adequate accommodations." The statute involved was said to have no reference to special circumstances but to be universal in its terms and to seem to require railroad companies to pay for sidetracks whether reasonable or not. Furthermore the statute made "the mere demand of the elevator

company conclusive, without regard to special needs and, possibly, without regard to place." There was no provision for a hearing. The statute also provided a fine for a failure of the railway company to pay for the track.

It was decided that the statute went beyond the limits of the police power. It was decided also, that the statute was unconstitutional, because it did not provide indemnity for what it required.

Emphasis is placed upon the latter point in Plaintiff in Error's brief, where it is stated that the decision is based solely thereon. It seems to us, however, that the question of whether the statute was within the bounds of the police power was the pivotal one in the case. It was necessary that it be decided in the negative before the question of compensation became of great importance, for the reason that provision for compensation is not an essential requisite in legislation of a police character.

A comparison of the essential features of the Nebraska case, which resulted in the decision that it went beyond the bounds of the police power, with the present case, is sufficient to show that, as a precedent, it has little if any bearing upon the questions now under consideration.

Thus in the present case the track is public and not private. There is not a "reduplication of already physically adequate accommodation," but an addition to terminal facilities which were voluntarily supplied by the carrier, but which are now admittedly inadequate.

The Minnesota statute, as construed by the Minnesota Supreme Court, is not universal in its terms, nor does it require the railway company to pay for sidetracks whether reasonable or not. It only requires such tracks to industries adjacent to its tracks after the State Commission has

found them to be "necessary and reasonable under all the circumstances," and the railway company is only required to pay the portion of the expense, which the Commission has found to be reasonable. Under the Minnesota statute the right of way is conveyed to the railway company.

The Minnesota statute does not make the mere demand conclusive, without regard to special needs or place. It requires a determination of the question of necessity by the State Commission.

Unlike the Nebraska statute, the Minnesota statute makes ample provision for a hearing, first by the Commission and then by the courts.

The provision for a fine which the Nebraska statute contained is absent from the Minnesota statute.

Therefore, the circumstances which required a determination, in the Nebraska case, that the statute went beyond the bounds of the police power are entirely absent from the case at bar.

The case of Missouri Pacific Ry. Co. v. Nebraska, 164 U. S. 403, presented entirely different questions from those involved in the instant case. There an order of the State Commission required the railway company to grant to individuals the right to build and maintain an elevator, upon its right of way. The order was based upon the state law forbidding discrimination and was sustained by the Supreme Court of Nebraska.

This court said in that case:

> "To require the railroad company to grant to the petitioners a location on its right of way, for the erection of an elevator for the specific purpose of storing from time to time the grain of the petitioners and of neighboring farmers, is to compel the railway com-

pany, against its will, to transfer an estate in part of the land which it owns and holds, under its charter, as its private property and for a public use, to an association of private individuals for the purpose of erecting and maintaining a building thereon for storing grain for its own benefit without reserving any control of the use of such land, or of the building to be erected thereon to the railway company for the accommodation of its own business, or for the convenience of the public."

"This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States."

As was said in the Hairston case, supra:

"In Missouri P. R. Co. v. Nebraska, ubi supra, it was pointed out that the taking in that case was not held by the state court to be for public uses."

A number of decisions are cited in Plaintiff in Error's brief where the state courts have set aside orders for sidetracks, which are claimed to have a bearing on the instant case. The circumstances of those cases, however, were of such a different character as to render them of little value as precedents here.

Thus in the case of A. T. & S. F. R. Co. v. State, 24 Okla. 616, it was held that the particular section of the state constitution under which the proceedings were instituted was

inapplicable and that they should have been brought under another section. No brief was filed for the Corporation Commission in support of the order.

In the case of Commission v. Railway Co., 35 Tex. Civ. App. 52, an order of the Commission was set aside because it expressly made the rights of the public to the use of the sidetrack secondary to the rights of a lumber company.

In the case of McInnis v. Ry. Co., 109 Miss. 482, the order was reversed for the reasons which were set forth in the opinion, as follows:

> "This statute has no reference to special circumstances. It is universal in its terms. Any person or corporation, engaged in the business of manufacturing, or in any other industrial pursuit, may secure at the hands of the Railroad Commission, an order compelling any railroad company to construct a spur to serve his or its plant whether it be reasonable to do so or not, if the Railroad Commission is of the opinion that the spur track will not endanger the property or trains of the railroad company. * * *
>
> "The statutes of Nebraska, so far as the principles involved in this case are concerned, are, in all essentials, the same character of legislation as our statute under review."

In the case of Mays v. Ry. Co., 75 S. C. 455, not only was the law very different from the one involved in this case, but the question of the right to require the track under the police power was expressly withdrawn from the case by counsel.

In the case of Northern Pacific Ry. Co. v. Commission, 58 Wash. 360, the order seems to have been made without the authority of any express statute. It was reversed on the ground that the use was a private one.

Conclusion.

As we have stated above, the only reasons urged by the Plaintiff in Error for reversing the judgment in this case are that it is required to bear a portion of the cost of the trackage and its claim that the trackage will be private. We believe no sufficient reason has been shown why this court should not follow its usual custom and accept the judgment of the state court as to the character of use, and that the judgment of the state court should be sustained as well within the bounds of the police power.

Respectfully submitted,

CLIFFORD L. HILTON,
Attorney General,

HENRY C. FLANNERY,
Asst. Attorney General,
St. Paul, Minnesota,

AUGUST G. ERICKSON,
Springfield, Minnesota,
Attorneys for Defendant in Error.

CHICAGO & NORTHWESTERN RAILWAY COMPANY *v.* OCHS, DOING BUSINESS UNDER THE NAME OF A. C. OCHS BRICK & TILE COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 159. Argued January 20, 1919.—Decided April 14, 1919.

Under the law of Minnesota a siding built by a railroad to reach a private plant under the circumstances in this case becomes a public track, part of the railroad's system and property and wholly under its control. P. 419.

Within the limits of what is reasonable, and not arbitrary, a State, upon due notice and opportunity for hearing, may require a railroad company to alter and extend a side track, as a public track, and as part of the railroad's property and system, for the purpose of serving a private plant, but for all others as well who may have occasion to use it, and may require the railroad to share the expense of construction; and this does not take the railroad's property for private use, or without compensation for public use, in violation of the due process clause of the Fourteenth Amendment. P. 420.

In determining whether such a requirement is within the bounds of reasonable regulation or essentially arbitrary, not only the expense, but also the nature and volume of business to be affected, the revenue derivable from it, the character of the facility required, the need for it and the advantage to shippers and the public, are to be considered. P. 421.

135 Minnesota, 323, affirmed.

THE case is stated in the opinion.

Mr. Richard L. Kennedy, with whom *Mr. L. L. Brown*, *Mr. W. D. Abbott* and *Mr. S. H. Somsen* were on the briefs, for plaintiff in error:

That the order for construction and maintenance of this trackage, which involves an expenditure of money and the taking of a part of the railway right of way,

amounts to a taking of the railway company's property, there can be no question. *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wisconsin*, 238 U. S. 491; *Oregon R. R. & Nav. Co.* v. *Fairchild*, 224 U. S. 510; *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403.

Any freight revenue that may come to the railway company by reason of the construction of this trackage, if any, must be in the way of reasonable and legal charges made to all shippers for services performed as a common carrier and not as compensation for the taking of its property. *Chesapeake & Ohio Ry. Co.* v. *Lumber Co.*, 174 Fed. Rep. 107.

Also the taking of property and the fixed right to compensation therefor must coincide although payment may be deferred. The right must be fixed. *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Wisconsin, supra; Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Sweet* v. *Rechel*, 159 U. S. 380.

Property cannot be taken under the police power for private use at all or for public use without compensation.

The track is not a public one under the law of Minnesota.

Since the rendition of the judgment, the railroad has been taken over by the United States Railroad Administration, so that the order cannot be complied with.

Mr. Henry C. Flannery, with whom *Mr. Clifford L. Hilton* and *Mr. August G. Erickson* were on the brief, for defendant in error.

Mr. Justice Van Devanter delivered the opinion of the court.

An order of the Railroad and Warehouse Commission of Minnesota requiring a railroad company to alter and

extend a side track leading from its main line to an adjacent brick and tile manufacturing plant is here in question. The order was made under a local statute (Gen. Stats., 1913, §§ 4231, 4284) on complaint of the owner of the plant, after due notice and full hearing, and on successive appeals was sustained by the district court of the county and the Supreme Court of the State. 135 Minnesota, 323.

The principal controversy before the commission was as to who should bear the cost of the work. The railroad company objected to bearing any part and the owner of the plant was not willing to bear all. If the cost was put on the latter, the railroad company was ready to make the alteration and extension. The statute, as construed by the Supreme Court of the State, authorized the commission, if it ordered the work done, to make a reasonable apportionment of the cost. *State* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 115 Minnesota, 51. By the order the commission practically assigned two-thirds to the railroad company and one-third to the owner of the plant, and required the latter to secure the right of way at its own expense and to invest the railroad company with a perpetual right to use the same for railroad purposes.

In the state courts the railroad company, without questioning the terms of the apportionment, if the cost was to be divided, contended that the statute as construed and the order as made were repugnant to the due process of law clause of the Fourteenth Amendment, in that to require the company to bear any part of the cost was to take its property for a private use without its consent, or, if the use were public, to take the property for such use without compensation. Both phases of the contention were overruled and this is the matter on which error is assigned.

The facts are not in dispute and are these:

The plant is about a quarter of a mile from the railroad

company's station at Springfield, Minnesota, a place of over 1,500 inhabitants, and has been in operation as much as twenty years. During that time the railroad company has maintained and operated a side track leading from its main line to the plant and the products of the latter have been shipped out and fuel and other supplies shipped in over this track. The railroad company has been free to use the track for other purposes and has done so occasionally. The yearly shipments from the plant have been about 250 car loads and those to the plant about 50 car loads, the freight charges thereon exceeding $10,000. Without the side track the plant would be a failure and the public would be without its products; with it the plant is a success and the products reach and are used by the public. The demand for the products has come to exceed greatly the capacity of the plant and the owner is now enlarging it at a cost of $150,000. The output, as also the aggregate freight charges, will be more than doubled thereby. The entire output moves over this railroad, no other being accessible. To serve the enlarged plant and handle the increased shipments, out and in, the present side track—about 460 yards—must be rearranged and extended about 350 yards. The estimated cost of the work according to plans substantially agreed on will be about $2,300.

Under the settled rule in Minnesota a side track such as is in question here is not merely a private siding, but "additional trackage for public use." If need be the right of way for it may be acquired by condemnation. It becomes the property of the railroad company and an integral part of its railroad system, and is wholly under its control. Besides enabling the public to get the products of the industry served, it is at the service of all who have occasion to use it and must be operated accordingly. *Range Sand-Lime Brick Co.* v. *Great Northern Ry. Co.*, 137 Minnesota, 314, and cases cited.

Of such a track and of the power of the State to impress on it a public character this court said in *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, 222:

"'The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.'[1] There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. [Citing cases.]

"While common carriers may not be compelled to make unreasonable outlays (*Missouri Pacific Ruy. Co.* v. *Nebraska*, 217 U. S. 196), it is competent for the State, acting within the sphere of its jurisdiction, to provide for an extension of their transportation facilities, under reasonable conditions, so as to meet the demands of trade; and it may impress upon these extensions of the carriers' lines, thus furnished under the direction or authority of the State, a public character regardless of the number served at the beginning. The branch or spur comes into existence as a public utility and as such is always available as localities change and communities grow."

In our opinion the conditions here were such as to bring the action of the State through its legislature and commission within the range of that power.

Recognizing then that the side track is for a public and not a private use, we come to the question whether requiring the railroad company to bear a part of the cost involves a taking of its property without compensation.

As a common carrier a railroad company assumes and must discharge the obligations which inhere in the nature of its business. Among these obligations is that of providing reasonably adequate facilities for serving the

[1] *Hairston* v. *Danville & Western Ry. Co.*, 208 U. S. 598, 608.

public. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 595. To do this requires an expenditure of money, of course, but the expenditure is for property which will belong to the company and be employed in its business. The money is not taken from the company and given to others, nor is the use of the facilities to be uncompensated. Like other property employed by the company in the transportation of persons or property, the facilities have a real bearing on the rates which it is entitled to charge. Therefore an enforced discharge of the duty to provide such a facility does not amount to a taking of property without compensation merely because it is attended with some expense. *Wisconsin, Minnesota & Pacific R. R. Co.* v. *Jacobson*, 179 U. S. 287, 302; *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 193 U. S. 53; *Atlantic Coast Line R. R. Co.* v. *North Carolina Corporation Commission*, 206 U. S. 1, 26–27; *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 278–279; *Oregon R. R. & Navigation Co.* v. *Fairchild*, 224 U. S. 510, 529; *Michigan Central R. R. Co.* v. *Michigan Railroad Commission*, 236 U. S. 615, 631; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission of West Virginia*, 242 U. S. 603.

Of course, the expense is an important element to be considered in determining whether the requirement is within the bounds of reasonable regulation or is essentially arbitrary, but it is not the only one. The nature and volume of the business to be affected, the revenue to be derived from it, the character of the facility required, the need for it and the advantage to be realized by shippers and the public are also to be considered. Tested by these criteria we think the order in question is not arbitrary, but reasonable.

The case of *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196, on which the railroad company relies, is plainly distinguishable. The Nebraska statute there condemned, as applied by the state court, required the company to

bear the cost of "reduplicating already physically adequate accommodations," on the demand and for the benefit of certain shippers, and this in the absence of exceptional circumstances, if any there could be, making such an extraordinary requirement reasonable. Besides, the statute made no provision for a preliminary hearing before an administrative body and yet subjected the company to the risk of a fine of at least five hundred dollars if it awaited a hearing in court on the reasonableness of the demand.

Here there was provision for a full hearing before the commission and also in the district court of the county. Both found the existing facilities inadequate, and there was ample evidence to sustain the finding; so the order cannot be regarded as calling for a reduplication of what already is supplied.

Judgment affirmed.